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LETTER

TO

LORD CAMPBELL,

LORD CHIEF JUSTICE OF ENGLAND,

ON

REFORMS IN THE COMMON LAW.

WITH A

LETTER TO THE GOVERNMENT OF INDIA

ON THE SAME SUBJECT,

ETC. ETC.

78731

BY

SIR ERSKINE PERRY,

CHIEF JUSTICE OF H. M. SUPREME COURT, BOMBAY.

N. e. 26

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LETTER TO LORD CAMPBELL,

&c. &c.

Bombay, 7th Oct. 1850.

MY DEAR LORD,

INFORMATION in the public prints, as well as private communications from yourself, and from my old and much revered master, Mr. Justice Patteson, having made it known to me that the Judges were seriously intent on improving the system of Special Pleading, a flattering intimation in one of your Lordship's letters, that I might possibly be of some assistance if I were in England, has emboldened me to take the present course of endeavouring to obtain a hearing for some very decided and deeply rooted opinions which I have formed upon the subject, after a careful attention to it during many years.

But I feel so deeply conscious that a merely casual, flattering expression in a private letter affords no justification for the apparent presumptuousness of an absentee, like myself, of nearly ten years' standing, attempting to address the Profession in terms of counsel and experience, that I feel it due, both to them and to myself, to explain the grounds on which I venture to present myself as a "skilled witness."

It is well known to your Lordship that the Supreme Courts in India administer every branch of the Law of the land—the Criminal Law by the aid of Juries, Common Law, with Special Pleading and the New Rules, without Juries; Equity according to the practice of the High Court of Chancery; Ecclesiastical and Admiralty Law according to the practice of the Courts at Doctors' Commons. The Judges further administer the Law as to Insolvents and Bankrupts under a special Act, and the Chief Justice, moreover, has a Vice-Admiralty jurisdiction.

But, independently of all these jurisdictions, which have been modelled entirely on the types of corresponding Courts in England, a Court has existed in Bombay for the last fifty years, presided over by a Supreme Court Judge, in which small Common Law causes are tried by summary procedure, that is to say, with pleadings reduced to form by the Officer of the Court, the parties attending before the Officer with a statement of the facts of their case, and with their witnesses, and subsequently appearing in Court in person, with or without counsel, as the case may be. This jurisdiction, having proved most satisfactory to the community, it has been enlarged from time to time by different Judges, and now extends to the trial of causes of every description not exceeding £60 as the amount claimed.

The facts I have mentioned demonstrate that an

Indian Judge, in the daily administration of justice, has his attention directed to the various, and frequently conflicting, rules of practice belonging to these various jurisdictions, and an opportunity is thereby afforded him, which no practitioner in England possesses, of testing the efficacy of all the different systems of procedure. But this attention, during the last seven or eight years, has become much more intense, in consequence of inquiries which were instituted by the Law Commission early in 1843, with the view of reducing the oppressive expenditure attending proceedings in the Queen's Courts, and which originated some very lively polemics among the Judges, running through several years, on the whole theory of procedure, the records of which may be traced by industrious inquiries among the ponderous Blue Books of the Law Commission and of Parliament.

It is, therefore, after a deep and continuous attention to the subject, both theoretically and practically, extending over upwards of nine years, that I venture to reprint, in an Appendix, some papers published in India, and which sketch out what I humbly conceive to be the sound principles of procedure.

The first paper, marked A, is an attempt to make the *rationale* of this dry and distasteful subject intelligible to statesmen, legislators, and practical men of the world. For as, in the controversy to which I alluded above, the views propounded by my learned friend Mr. Cameron, late

President of the Law Commission, and by myself, were combated by the greater part of the lawyers in India, it was evident that the Legislature (especially the *Parliamentum indoctum* of India, which contains only one lawyer), would be ignorant how to act, so long as the discussion rolled on in technical details. But as the business of decision, when fundamental or organic changes were proposed, vested in the Legislature, I was desirous to engage the attention of statesmen like Lords Hardinge and Dalhousie, and, still more, of the able civilians in Bengal influential in, and with, the Legislative Council of India, and who by their practical acquaintance with judicature are eminently fitted to decide upon any question of the kind, when stripped of the technical phraseology of English Law. I may, perhaps, without boasting, assert that I was not unsuccessful in my endeavours, and if the Court of Directors had not been seized with a 'lawyer panic' in 1848, we should probably have had established in Bombay, at the present moment, a system of procedure which would have secured to the Native community the administration of the substantive English Law, which they so much reverence and appreciate, without the grievous oppressiveness of costs, which have called down upon the Supreme Court the fierce denunciations of Mill, and the brilliant sarcasms of Macaulay.*

* I may also mention, with pride and gratification, that my friend Sir George Anderson, who, after filling some of the highest posts in the Company's service in India, is now Governor of

The paper marked B, in the Appendix, is addressed more exclusively to the Profession, and exhibits a series of proofs, in behalf of my assertion, that Special Pleading has always been a cumbrous and unsatisfactory instrument in the administration of justice, and that it ought to be abolished from every Court of Common Law in the British empire.

I fear that my readers of the Common Law Bar will at once turn aside from my pages, when they meet with a proposition which implies such a revolutionary movement in the whole fabric of our Common Law procedure, and will class it amongst the neologies of the day, as not worth a serious thought. But I entreat the Common Lawyers to meditate carefully over the two following well marked phenomena, which present themselves to the attention of an observer.

First, the public demand, and not an unenlightened demand, for cheap and speedy justice, is diffusing itself so widely in society, that a readiness may be perceived to accept a very inferior system, which shall combine the two attributes of speed and cheapness, in preference to the more elaborate but costly system of Westminster Hall. Hence the widespread popularity of the County Courts, founded on their summary procedure, absence of pleadings, and examination of parties, which on the whole

Mauritius, has succeeded in introducing into that island an improved system of law procedure, on the principles advocated in the above pages, and which we had oftentimes discussed whilst he was Governor of Bombay.

compensate for the disadvantages arising out of inability to check caprice, ignorance, and misdecision on the part of the Judge. The phenomenon is fully explained by a Persian proverb, which we occasionally hear in this country, signifying, that "short injustice is better than tardy justice!"*

Second, it is now fully acknowledged by the highest authorities in the Law, that the evils arising out of the present system of Special Pleading must be dealt with and extirpated.

Now, to correct these evils, it is obvious that only three courses present themselves; first, to introduce alterations and amendments, after the manner of the New Rules of stat. 4 W. 4; second, to adopt a new system of Special Pleading, as was proposed by my learned friend Sir L. Peel at Calcutta; third, to abolish Special Pleading, as has been effected partially by the Legislature of New York, and still more and completely by Parliament in the County Court system.

The New Rules were framed to correct an evil which has always formed the opprobrium of Nisi Prius practice, namely, the ignorance in which parties were left by the pleadings as to the question to be raised at the trial. No care, forethought, or expense could guard against the danger of surprise, and oftentimes, when some unforeseen question became the issue on which the verdict depended, the zeal, acuteness, and warmth displayed on either

* Na huk kowta beytur uz huk darâz.

side in the exciting drama of a Nisi Prius contest, so completely pinned down the combatants to the field of battle thus casually selected, that the difficulties became insuperable subsequently in attempting to set aside the verdict when once pronounced. Under the New Rules this evil is, no doubt, greatly diminished, but two different ones of equal magnitude are produced by them,—namely, the difficulty of getting a case with novel and complicated facts on to the record; and, secondly, the sending down the cause to trial on issues never raised or dreamt of by the parties, and frequently irrespective of the merits of the controversy. Indeed, the surprise of suitors, when, after months of preparation and anxiety, they come down to Court, and hear what the points are on which their cause is being battled and decided, may be compared to that of a man supposed to be murdered, at the trial of whose so-called murderers (they had, indeed, confessed the crime) I was present at a Court in the interior of India, when the murdered man suddenly appeared in Court, and examined the remains of the corpse which had been sworn to as his with a bewilderment and painful curiosity ludicrous to behold. If then, at the present juncture, the strict rules of pleading are to be relaxed, a recurrence will be made to the "general issue" system of the last century, which experience had fully condemned; if, on the other hand, the Rules should seek to compel a more precise disclosure of the case relied on than is now obtained,

the evils which demand a revision of the system in existence since 1834 will become aggravated. But above all, looking at the divers attempts, extending through centuries, which have been made to improve the working qualities of Special Pleading, and especially looking at the now acknowledged failure of the last great effort by the Judges in 1834—by men whose reputation as Jurists and Pleaders equals that of their greatest predecessors in Westminster Hall—what prospect is offered by experience, that an improved edition of the New Rules will be more successful now ?

Secondly, a new system of Special Pleading, such as has been elaborated with infinite pains, and profound acquaintance with the defects of the present system, by Sir L. Peel at Calcutta, is open to the very grave objection brought against it by the Privy Council, that it is the substitution of one technical system for another, of a new system fraught with all the ambiguities of novel language and unprecedented forms, for an old system which centuries of exposition have made clear and precise.*

* The new division of actions proposed by Sir Lawrence Peel appears to be decidedly objectionable, for while it destroys all the distinct ideas which the compendious terms 'trover, assumpsit, trespass, &c.' awaken in the legal mind, the new classification appears faulty both in nomenclature and in principle. Sir L. Peel classifies as follows, 1st, "Action for money;" 2nd, "Action for moveable property;" 3rd, "Action of wrong;" 4th, "Action for immoveable property." But an action for a tort is

There only remains then for consideration, the propriety of abolishing Special Pleading altogether.

But, before this proposition can be discussed properly, a fundamental principle in procedure requires to be settled, as to which the most divergent practice exists in the English Law, and which needs the interposition of the Legislature in order to its due establishment. In Equity practice, as your Lordship will well recollect, the whole of the case on which either party relies is known to the opponent before they present themselves before the Judge; the facts alleged may be denied, the conclusions of law may be disputed, still the point in dispute, and the opportunity of testing minutely the truth of every statement, the authenticity of every document, and the character of every witness

as much an action for money, as an action on a contract; an "Action of wrong" again in terms includes every case of broken contract. The division of actions founded on *title* into two classes, referable to the accidental distinction of 'moveable' and 'immoveable' property, sins still more against scientific propriety. And if it be deemed expedient to introduce a new division of actions into the English Law, it does not seem easy to improve upon the following three-fold division of the later civilians:—

1. Actions *in re*—claims on contract.

2. Actions *in rem*—claims on title.

3. Actions *ex delicto*—claims for damages arising out of misfeazance. A division which might be generalized thus:—

I. Actions on contracts.

II. Actions not on contract, viz. { 1. *in rem*. 2. *ex delicto*.

brought forward by the adversary is fully afforded. Moreover, as the parties to the case usually know more of the real facts in controversy than any other witnesses, they are compelled to state all they know in behalf of their opponent, and the reader is referred to Lord Langdale's powerful description of the effect of *discovery* in eliciting the truth, post p. 56, to enable him to judge of the value of the practice. At Common Law, on the other hand, the struggle is to keep the opponent in the dark up to the time of trial, as to the case to be brought against him, and as to the witnesses and documents relied upon in proof. So far from the testimony of the party against his own interests being obtainable from him by law, he is allowed by the rules of pleading to set up notoriously false pleas, such as *non assumpsit*, *non est factum*, &c. and often is properly allowed so to do, as it is found that the system does not allow of any method equally available for eliciting the real facts attending the making of the contract, &c.

Now it is evident that of these two conflicting systems which co-exist with a view to the same object—the elicitation of truth—both cannot be correct, and I think that a very little examination will shew that the Equity system is far more consonant to common sense, and the requirements of justice, and that it has a marked superiority over its rival in excluding chicanery, technicalities, and the triumphs of form over substance. In the

first place, the great principles now referred to in Equity practice have all been carefully matured at a comparatively late period in our history, and by the greatest minds in our annals, by Bacon, Clarendon, Nottingham, Hardwicke. The rules of the Common Law on the subject have on the other hand been framed without reference to principle, and have been subjected to no searching examination, but are the accidental growth of centuries, and, (certain symptoms of their little foundation in reason,) are modified by innumerable exceptions.

Secondly, the practice of all enlightened nations of Europe in requiring a mutual disclosure of each litigant's case before the day of trial is an authority that no one will think light on a question where English practice is divaricating.* And lastly, the Legislature, in the system which it has laid down for the County Courts has clearly adopted the principle,

* I have shewn in a note C. at the end of this pamphlet, the mode in which the evidence is communicated to the opposite side under the Code Napoleon, and the following passage from Camus shews what a liberal and high minded practice had long existed amongst the bar at Paris. "Il a toujours été d'usage au Parlement du Paris, que les avocats qui sont chargés de quelque affaire l'un contre l'autre, se communiquent mutuellement leurs sacs, sans recepisse." ... "l'avocat doit y mettre toutes les pièces dont il entend se servir en plaidant." And it is observed emphatically, "*il n'y a pas d'exemple qu'il en soit jamais arrivé aucun inconvénient.*"—Lettres sur la profession d'avocat. Ed. par Dupin. tom. 1. p. 429.

though it has not hitherto been necessary to enter into the details, established in Equity.

It may be further observed in reference to this subject, that the difference in practice which has been here shewn to exist between Equity and Common Law proceedings does not in any way depend on the circumstance of a jury being introduced in the one case and not in the other, for in criminal proceedings at Common Law the case of the *actor* or prosecutor is just as fully disclosed before the trial, as in a suit in Equity.

I will assume then, for my argument, that the ends of justice as well as the tendency of public opinion at the present day imperatively require that there shall be nothing like concealment, keeping back of the truth, or attempts at surprise amongst litigant parties, and that the object to be aimed at by the Judges in framing their rules of procedure is to enable suitors to bring the facts, all the facts of their case, in the speediest and fullest manner before the Court. It is evident that these two objects, speed and completeness, are frequently incompatible, and I think it will be found upon examination that only one of them is usually kept in view at a time. In the Court of Chancery, and still more in the procedure of Continental nations, completeness is chiefly aimed at, and accordingly we hear in civil causes of suits lasting from 20 to 200 years,*

* A suit at Berlin of the latter duration was lately mentioned in the London Papers as still undecided.

and in criminal trials such a range of inquiry into the biography of the prisoner and the witnesses is admitted, as appears startling to English Practitioners. On the other hand the practical English mind is content to sacrifice a portion of completeness for the advantages of an early decision, and all our Common Law procedure is marked by endeavours, generally successful, to obtain a speedy and final decision of the cause. The late improvement which has been introduced by the Legislature for the trial of small causes has reference to speed only, for there is not a single provision in the Acts which tends to insure completeness, and the objections made to the late Act by the present Chief Justice of the Common Pleas, and by other lawyers in the House of Commons, were many of them worthy of the deepest consideration on this score.

It is evident, therefore, that the great problem for Law Reformers and Jurists at the present moment is to present a system of procedure which shall combine the above two objects with as little undue sacrifice of either as is possible.

I venture to offer as a solution the following scheme, which involves the total abolition of Special Pleading, and which is founded on the following principles: 1. Summons with notice; 2. Early appearance of the parties before the judge; 3. Power of mutual discovery; 4. Oral pleadings recorded by the officer of the Court; 5. Judgment moulded by the Court to meet the facts of the case.

Now in applying any system of procedure to the trial of Common Law cases, it is evident there are two classes of cases to be disposed of, differing much in their nature and requirements, viz. simple and complicated cases. The former class, in which there is no real defence, and generally speaking no defence at all, (the Committee of London merchants, presided over by Mr. Hawes, lately made out by returns that this proportion consists of 96 per cent) cannot be disposed of too summarily, or quickly, and the admirable success of the County Courts demonstrates that for such cases a summary system without special pleading is all satisfactory. But simple cases are not to be defined by the money amount sought to be recovered in them, and the merchant's bill of exchange for £5000, or the demand for rent of a Grosvenor Square house, affords no more difficulty to the law tribunal than a promissory note for £10, or the claim for a week's rent on a lodger. To all such cases, therefore, the advantage of dispensing with expensive pre-arranged written pleadings is obvious.

There remains the class where there really is something, whether of law or fact, to try; where it is necessary to impress firmly on the mind of the Judge minute facts from which legal conclusions are deducible, where it is expedient to chalk out the limits beyond which the discussion is not to proceed at the trial—cases, in short, in which the

advantages afforded by careful written statements should be available to the parties.

It is my business to endeavour to demonstrate that the fundamental principles laid down above, with certain modifications suited to each case, are applicable to this class of cases also, and I will shew practically the mode in which a complicated cause at Common Law might thus be disposed of. It is some proof of the soundness of these principles that they are capable of universal application, to a Court in the jungles of Sindh as well as to Westminster Hall, to a Court of Equity as well as to a Court of Common Law. I may observe, before going through the stages of a suit, that I adhere as much as possible to old names and forms, as I regard every change in the forms of law as an evil *per se*, and only to be justified when a greater evil is to be extirpated.

I.—Summons with Notice.

A summons, with particulars of demand, gives ordinarily sufficient notice to the Defendant of what the claim against him is, and at this stage of the proceedings no fuller written claim is at all necessary. Although the suit be complicated it does not follow that the Defendant does not know himself to be in the wrong, and an opportunity should be afforded by the most simple and economic proceeding for allowing him to come to terms with the Plaintiff at once. The advantages of this practice

are well illustrated by the present operation of a summons at Common Law, and the grand improvement introduced in Equity pleading by Lord Cottenham of the substitution of a *claim* for the Bill in Equity, in certain cases, shews how widely applicable the principle is. If, however, it is apparent from the first that a vigorously contested lawsuit is inevitable, it should be competent to the Plaintiff to expand his particulars into a full statement of his case. Such particulars under a rule of Court should be paragraphed, like pleading at Doctors' Commons, and if the Defendant's evidence is required, an answer in writing should be demanded to the particular paragraphs specified.

The summons should contain the following note:

"The Defendant must appear by himself or professional adviser at the day mentioned, but, if his evidence is necessary, his presence cannot be dispensed with."

II.—Appearance of Parties before the Judge in open Court.

This appearance is the corner stone of the procedure now recommended. It has succeeded wherever it has been attempted, (for proofs of which assertion see examples in the Appendix) and the advantages obtainable from it, both to suitors and the ends of justice, are so great that it would require a volume to set them forth. In the complicated suit in question, for example, it appears at the

first hearing before the Judge, that long and difficult accounts between merchant and agent, or claims and counter claims on builder's work, are in question, cases which all experience has demonstrated to be incapable of satisfactory decision at Nisi Prius. In all such cases half a dozen words from the Judge will usually succeed in persuading the parties (the power indeed ought to be inherent in the Court) to refer the matter to the Master or other arbitrator, a proceeding which, after vast unnecessary expenditure, is nearly always the ultimate issue now. So also in family suits, and in disputed cases where the expense of the inquiry must very far exceed the value of the matter under controversy, an expression or two of soothing import, or pointing out the inevitable results of such litigation, from the mouth of a grave, impartial, and respected magistrate will in very many cases at once allay hostile passions, and terminate the suit.

But in all other cases this early presence of the parties before the Judge serves to promote the two objects in view, speed and completeness, in a manner which no other scheme holds out. If the Defendant has answered by the card to the Bill of discovery contained in the Plaintiff's particulars, it should be open to the Plaintiff, under the control of the Judge, to cross examine the Defendant on the points wherein he has made insufficient disclosures, and Equity practitioners will admit that with such a check hanging over parties, who are bound to

answer in writing, no skill or astuteness would suffice to enable a Defendant to shut out important hostile facts. On the other hand, if the Defendant has a special case of defence to set up, it should be open to either party to demand that it be put in writing, and a statement in all respects resembling the Plaintiff's bill of particulars would be served upon the latter, and with the like right to demand discovery. Other incidental proceedings, such as commissions to examine absent witnesses, substitution of secondary for primary evidence, and other matters requiring the authority of the Judge would also be disposed of at this meeting with great benefit to suitors, in point of speed and economy, and the advantages which Equity procedure affords in the easy mode by which the opinion of the Judge is obtained on interlocutory proceedings may be again referred to with effect.

III.—Discovery.

Having already alluded to the arguments in behalf of this instrument for obtaining evidence, I will add nothing but a reference to the universal testimony of Equity practitioners on the subject.

IV.—Oral Pleadings.

The Plaintiff having furnished the Defendant with his written particulars of demand, in articles, obtained discovery from him, if necessary, and the Defendant having served a similar paper on the

Plaintiff, if he chooses so to do, such papers obtaining the specific names which practice would soon confer on them, either Plaint and Reply, or Plaintiff's Statement and Reply, Counterstatement and Reply, &c. the principle applicable to them would be that they should each be amendable either before trial, like pleadings in Equity, and at the trial also like pleadings in Common Law, but the case as stated by the parties should never appear in more than these documents, the Statement and Reply. The *issues* to be raised from these cases is the subject for argument amongst the pleaders at the bar, for decision by the Judge, and for recordation (when a record is necessary) by the officer of the Court.

At first sight this would appear to be an extraordinary departure from existing practice at Nisi Prius. But on closer examination it will be found to correspond in substance with what usually occurs in the most important cases. In assumpsit for money had and received, in ejectment, and in many other cases the *issue* raised by the pleader gives no information to the jury of the real matter in dispute. It rests upon the Judge to elicit from the facts proved, and from the arguments alleged at the bar what the *question* for the jury is, and, if after this inquiry he states the question wrongly, the verdict is set aside for the misdirection. Under the system proposed, the Judge would have the opportunity of framing the *question* after perusing the carefully composed statements of the party's case instead of

the obscure and unsuggestive Nisi Prius record, and exactly the same check would be at hand to ensure sound decision. It appears to me to be self-evident that as it is impossible for strangers, professional advisers or others, to know what the real question in dispute between litigants is until after the most rigorous examination of the facts in the case, the framing of the issue should be left to the last stage in the suit by oral pleadings, and not be framed prematurely as at present under special pleading.

A record of the case in the most compendious form would be kept by the officer of the Court, and in the very few cases, in which in these days a record is required for reference, it would be made up in full with copies of all the documents filed in the case at the expense of the applicant.

V.—Judgment of the Court.

It is, I think, generally admitted that the ends of justice are not fully met by the stereotyped judgments of the Common Law, which are applied to all cases alike. Attempts have been made, and in certain cases successfully, to modify the judgment by ordering the damages to be reduced, on the performance of certain acts by the Defendant, but I think the interests of suitors would be much advanced if the Court had something of the power to mould the decree which belongs to an Equity Judge. I admit the delicacy of the operation, and

it is probable that the Judges of the County Court have gone too far in their practice of suspending the effects of the judgment obtained, for in most cases the self-interest of the successful suitor is more likely to discover when and how the judgment should be put in force than all the acumen of the Judge. Still the infinite diversity of circumstances in contested cases seems to make it proper that the Judge should have power to modify the judgment to the case.

Finally, it is an essential requisition for the working of this system, that a Judge should always be sitting at Nisi Prius during the business portion of the year. The cases which come under the category 'simple' should evidently be disposed of without the intervention of a jury; but for all cases of complication and for real trial I should be extremely sorry to see this time-honoured institution, with all its collateral advantages, fall into desuetude. It is evident, therefore, that, with a very slight alteration in existing arrangements, the system proposed might come into operation by a Puisne Judge sitting every day for simple cases, and for preliminary inquiries, while the Chief Justice and the Judges on circuit would take the sittings after Term and Assizes as usual with a Jury for all complicated cases.

I am aware that, in the above rapid and hurried sketch, from my desire to be brief, I have touched many important points so lightly as to

lay myself open to objections on the ground of obscurity and incompleteness, but the little leisure afforded me during a heavy criminal Sessions, the uncertainty of finding readers, and the form in which I am addressing the public, leave no other course open to me. I justify myself fully in my own eyes for the strong advocacy I here present to the profession of a more simple, cheap, and efficacious system of procedure, by the invariable success which I have observed to attend upon the introduction of its leading principles wherever it has been made, both in the Supreme Court of Bombay and elsewhere. Of late years my learned colleague and myself have raised the jurisdiction by summary procedure from £35 to £60, we have adopted the same principles by consent in several complicated cases arising on the Equity, Ecclesiastical, and Admiralty sides of the Court, and *vivâ voce* examination of witnesses is now the general rule of the Court in all proceedings. The profession will be happy to learn that, with all this simplification of procedure, and consequent diminution of expense, the amount of business, and the prospects of practitioners were never so flourishing as at the present moment. And although I have alluded in a previous page to the Lawyer panic which raged some two or three years ago in Bombay, and which was elicited by an attempt to introduce into the Supreme Court many of the simple principles of procedure afterwards established by

the Small Cause Act, an attempt which for about two months conferred on me the distinction (in the language of the 'Friend of India') of being 'the best abused man in the East since the time of Lord William Bentinck,' I am happy to think that the interests of the suitors at large are found on the whole to coincide with those of the profession, and it is a matter of the deepest congratulation to me that the leaders of our Bar, men competent to lead in any Court of the Empire, most warmly cooperate with Mr. Justice Yardley and myself in our attempts to make all our procedure cheap, simple, and effective.

I have not the arrogance to suppose that the sketchy and perfunctory manner in which alone I have been able to shadow out novel principles of procedure will enable the scheme I submit to find favour in the eyes of those who have not contemplated the subject from the same point of view as myself. But my object will be gained if I shall in the slightest degree induce a persuasion that the whole subject of Common Law procedure demands a full investigation at the hands of the Judges of the land. To one so intimately acquainted as your Lordship with the writings of our great philosopher, it may not be out of place to quote his words on a cognate subject:—"Qui de legibus scripserunt, omnes vel tanquam philosophi vel tanquam jurisconsulti argumentum illud tractaverunt. Atqui philosophi proponunt multa dictu pulchra sed ab usu remota.

Jurisconsulti autem, suæ quisque patriæ legum, vel etiam Romanarum aut Pontificiarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tamquam e vinculis sermocinantur."* But this aphorism is still more applicable to law procedure than to law. At the present period of our legal history, when the public demand for improvement in law procedure is so widely spread and so well founded, when the two systems of technical proceedings under the old system, and of simple expeditious proceedings under the new, are in presence as it were, and in daily conflict, and when a most comprehensive survey is required to guide the public rightly to the ends in view, I wholly deny the competence of busily engaged practitioners, of any Attorney-General's commission, any more than of philosophizing speculators to work out the reform demanded. The office exclusively belongs to the Judges alone, and there never was a period when this comprehensive service to the British Empire could be so efficiently rendered as the present;—a period marked by the disposition amongst all ranks of mankind to improve public institutions to the uttermost, and marked also by the existence of a Bench in Westminster Hall who loudly proclaim that the deepest debt due by a lawyer to his profession, and to the world, is the obligation to improve the system of law by which himself and his country have flourished.

* De Augm. Sci.

A humble imitator, in these distant shores, of the bright examples whom I have been accustomed to look up to and reverence, I attempt to make a faint echo heard in England of inspirations I have caught from higher quarters, so as haply to swell the cry of enlightened public opinion, and aid in sweeping off the few cobwebs which centuries have attached to the majestic figure of British Justice, conscious that if I fail I shall at least be excused by your Lordship for the attempt, and that if I have any success, I shall facilitate to future administrators in this great apanage to the Empire, the performance of that duty which Almighty God has impressed upon Great Britain, and which sound policy dictates in scarcely less imperious mandates :—

Anglia jus præstans ter felices facit Indos.

I am, my dear Lord,

Most faithfully and sincerely yours,

E. PERRY.

APPENDIX A.

FROM

SIR E. PERRY, PUISNE JUSTICE, BOMBAY,

TO THE

HONOURABLE THE PRESIDENT OF THE COUNCIL OF INDIA IN COUNCIL.

HONOURABLE SIR,

The Judges of this Presidency have had the honour to receive from you a letter dated the 18th March, 1847, enclosing three Draft Acts,* upon which you request us to state our observations generally, and whether in our opinion it would be advisable to extend them to the Bombay Presidency, but, as the state of Sir David Pollock's health will disable him for some time from considering the various topics referred to, it devolves upon me alone to reply to your letter.

With respect to all the Acts in question a careful examination of them involves so much technical reasoning, and presents such an uninviting aspect, that very few, except mere lawyers, will choose to encounter the task of wading through the discussion. But the Acts Nos. 1 and 2, in the margin contain within them principles of such wide applicability, and are fraught with such large results either of good or evil to the community, that it is

* Sir L. Peel's Act, No. 1. Law Commissioners' Act, No. 2.

most important, if possible, to bring them to the notice of the statesmen and practical men, who are invested with legislative authority, and whose office it is to carry out the well weighed theories of the closet. I therefore propose to throw all technical details into separate Minutes, and to confine myself in this place to those general observations which your Honour in Council has been pleased to ask for.

Both of the Acts to which I last referred contain a large, it may even be said a radical, alteration of the procedure of the Supreme Court, and as this alteration proceeds on a recognition of many of the evils in existing procedure which I pointed out in my Minute of 3rd June, 1843, if the subject only involved the consideration of the legal exigencies of two large commercial capitals such as Calcutta and Bombay, I should content myself with stating my opinion that either of the two Acts would be beneficial to the communities of those cities. For although each of those Acts represents a theory on which the Law Commissioners and myself on the one hand, and the majority of the Indian Judges on the other, are combating parties, I have so little taste for controversy or desire to obtain a reputation in logomachy that I should not avail myself of my right of reply which I waived once before, or notice the hard blows which have been aimed at me from various quarters, though all, with one exception, in a most friendly spirit.

But, as I hinted above, I view the question of a

reform in English law procedure as one affecting the whole Indian empire. Of the large body of European administrators in this country, every one, from the Governor-General down to the ensign who was posted yesterday, is obliged to assume occasionally the character of a Judge. But on the various nice and complicated questions which must arise from time to time on such occasions, it can only be English notions of law and morality that will prevail, because the majority of the tribunals will be English, and on questions of difficulty those sources of authority will only be consulted which Englishmen have within their reach, and which from their earliest youth they have learned to respect. The principles of English law may not be superior, or they may be inferior, to the principles of Roman law, and in the science of ethics erroneous views may prevail on many important questions, still on the maxim *nihil est in intellectu quod non prius in sensu*, it is certain that when these two great sciences have to be referred to for the solution of various difficult questions in administration, Englishmen will be seen to be applying the doctrines which prevail in the land of their birth and education. And as I am unable to perceive in the vista of time any indication of British dominion ceasing, I appear to myself to see with corresponding clearness that the notions of English law must daily become more and more propagated through the length and breadth of the Indian empire.

I met with a very marked illustration of the proposition I am now asserting in a recent visit I paid to Ceylon. In that island English law is no where established. In the maritime provinces the Roman-Dutch law prevails, in the Northern districts bordering on India, the institutes of Menu are in force, and in the central province the Candian or Native Cingalese Code is the guaranteed lex loci. The fact however of the chief administrators of the law being Englishmen has introduced silently the English law as the code universally referred to in difficulties; and I was much amused on my visits to some of the District Courts to hear a native advocate attired in the neat *habit habillé*, borrowed from the Dutch, and the native garment round his loins well called by racy Knox "a clout," citing to a native Judge his Carrington and Payne and Dowling's Practice cases, with all the volubility of an attorney's clerk at a Petty Sessions in England.

But in India, English law as the rule of conduct of the governing classes, is established *quoad hoc* over the whole empire, the arguments urged by the Law Commission in their Report on a Lex Loci are to me conclusive that there is another large and increasing class to whom no other law is applicable; and the influences I have above indicated cannot fail to introduce into administration a continual stream of the spirit and doctrines of that law over other classes not nominally within its jurisdiction. All these considerations combine to point out the

importance of making the procedure of the Chief Court where English law is administered, a model, an authority or a guide.

I am aware that the Supreme Court is considered not to be a favourite with the Court of Directors, and recollecting that the institution was enforced upon the Company as a species of political check, and that its only connection with those tribunals is to defray all their expences, it is not to be supposed that the idea, the abstract notion, can awaken very agreeable associations. Those writers, therefore, in the public press, who are seeking to propitiate the Honourable Court will rarely be found to neglect an opportunity of criticising harshly the necessarily costly tribunals erected by Parliament. The Radicals, also, adopting the tone of that vigorous thinker James Mill, are ever ready to denounce the introduction of English Law into India. But notwithstanding the operation of those usually antagonistic, but in this instance combined, forces to resist importations from Westminster Hall, I am convinced that no statesman who has studied India on the spot can fail to recognize the unmistakeable tendency of the age—the imperious circumstances of the country, arising from extended commerce, increasing population of European race, and diffusion of sound European notions through the native community,—which demand a more widely recognized dominion for *the law*, and a dispensation of it in the higher courts by professionally educated Judges. For the

reasons I have given above, such law can only be the law of the land from which the governing European nation issues, and such professional judges can only be obtained where that law is studied professionally.

But I am sanguine enough to consider that the question of basing the procedure of the Supreme Court, on simple, intelligible principles, the reasons of which can be made apparent to all, and the adoption of which can be justified by the best lessons of experience, embraces a far wider field than even the extent of the Indian Empire. Wherever the English law prevails, that is to say in every corner of the earth, it is a question coming home to the businesses and bosoms of men to have it dispensed on the quickest and most economical terms consistent with the ends of justice. And although the lawyer caste in England, by which I mean principally the country attorneys, have been successful in resisting every attempt at Law Reform which seemed to militate with their interests, I think there can be no doubt that if once a successful experiment be exhibited, before the intelligent European populations of the Presidency capitals, of the whole corpus of English law being safely administered without any unnecessary expence, vexation or delay, the effect of it will not be lost upon John Bull, torpid as he ordinarily is on these subjects, and that he will be ready to join in the cry which a brother law reformer and myself frequently

interchange with one another, namely, that in the path of law reform,

Via prima salutis,
Quod minime reris, Gangis pandetur ab undis.

It is from a profound impression of the truth of these views that I succeed in overcoming the *vis inertiæ* which belongs to my constitution, and which, with a thermometer of 91° in this vacation month of May, would no doubt suggest a good many plausible reasons why I might limit myself on the present occasion to a reference to the opinions I have already expressed during the discussions of the last four years. But I cannot fail to perceive that these discussions must be attended with the most beneficial results sooner or later, and whether my minute of June 1843, contains a feasible, reasonable scheme, as I have been assured it does by some of the first lawyers in England and by the most distinguished practical men in India, or proposes a system which Sir John Peter Grant does not hesitate to pronounce to be "in truth a rude untried and ill-digested proceeding, suited as it appears to me, only to a state of society little advanced from barbarism," it has had at all events the merit of eliciting the opinions of Judges and Jurists, of disclosing very serious defects in existing practice, and of necessarily calling the attention of the educated minds of the day to the principles on which the science of legal procedure ought to be based.

I willingly, therefore, enter into a deeper dis-

cussion of this question. But I ought to premise that I do not consider practitioners like Sir L. Peel and myself to be the fittest persons to conduct this sort of inquiry. The Germans have a very good division of those who cultivate the study of the law into *Theoretiker* and *Praktiker*, the former are the scholars by whom the science is advanced, the latter are the practical men who apply the doctrines patiently thought out under the midnight lamp, to the every day business of life. A similar distinction prevails no doubt as to all sciences, and a ready illustration occurs to my mind in the passing political events of the day, wherein one may see the practical statesmen of the House of Commons carrying out the theories and enforcing the doctrines of the philosopher of seventy years ago,*—but it is in the Law especially that the distinction is most marked.

Now, to discuss the principles of procedure applicable to India, the Jurist should have unlimited time at his disposal, he should be acquainted not only with the existing rules in the code of law of his own country, and with the reasons, historical, accidental, or well considered, for their establishment, but he should also be thoroughly conversant with the mode in which other enlightened nations have dealt with the difficulties encompassing the subject. But a practitioner, especially an English practitioner, has no time for such inquiries; al-

* The New Corn Laws were just passing through Parliament at this period.

though the English bar is, I am firmly convinced, the most brain-worked class of men in the world, their time is fully occupied by learning and discussing what the law is, and even for that they have not time. Sir Lawrence Peel well says "the eminent men who are appointed to fill the highest judicial offices at home frequently regret their want of time to keep up their reading;" and again, "for my own part I regret that I have not more time for reading; I am in the habit of reading all the Reports of all the Courts in England, but I am unable to keep pace with the publication of them." I also profess to adopt the same course as my learned friend for keeping up my knowledge of the law, and although I undoubtedly have spare time on my hands occasionally for excursions *extra viam*, I must also plead guilty of not being able to keep pace with the very voluminous Reports of the present day. It is evident therefore that neither Sir Lawrence Peel nor myself have the opportunities within our reach for bringing to this discussion all the necessary information, extending over so wide a field, which is requisite. Our opinions therefore are chiefly valuable (and I have never considered my own in any other light) as the opinions of practical men sharpened by the business of daily life and stating the results of their experience as to the tools they work with.

It should not be omitted to be stated however, that an Indian practitioner, whethe ron the bench

or at the bar, possesses advantages over his compeers in England in a discussion like the present of no small value. At home it will be found that practitioners are nearly always enamoured with the practice of their own Courts. The general opinion among the profession and with the public at large is, that the procedure in the Courts of Doctors Commons is the worst in England: yet, on the evidence taken before the Ecclesiastical Commissioners, every practitioner examined expressed himself as warmly in behalf of it, as Coke or Blackstone do of the perfection of human reason generally.* The Common Lawyer boasts that his system of special pleading is a fine juridical invention, and viva voce examination the only satisfactory mode for the eliciting of truth, whereas the majority of Equity Lawyers, I believe consider with an eminent Civilian that the examination of witnesses on written interrogatories with closed doors and in the absence of the Judge and of the parties is "preferable to an examination at Nisi Prius, where every incautious or hasty expression is instantly *bellowed* to the Jury and insisted upon without giving time to the witnesses to correct a particle." 1 Browns C. L. 479. The Indian Judge having to administer all these different codes of procedure is no doubt to a great extent emancipated from these prejudices, and having moreover often to lay down a rule of proce-

* See Report of the Commission to Her Majesty ordered to be printed by the House of Commons, February, 1832.

dure of Courts in which he has not practised himself, and as to which, authorities often fail him, he is much oftener driven to consider the principles which dictate the establishment of rules than occurs to his brethren on the English Bench.

After this long, but I trust not unnecessary preamble, I proceed to an appreciation of the immediate question. The Supreme Courts of India have to administer to the communities within their jurisdiction the whole body of the English law, Civil and Criminal. Whatever rights have been created for the protection of the subject, whatever wrongs have been denounced, whatever provisions the records of the English law, extending over at least 600 years, contain for the protection of life, property, liberty, and reputation, by the theory of the Supreme Court, a party complaining of a breach of that law, can there find redress. The immediate subject of inquiry is as to the mode in which this complaint shall be made, and this redress administered. But directly a point of view has been obtained from which this subject can be viewed as a whole, it will be seen that wherever an application has to be made to a Court of Justice, certain steps of procedure must occur and certain difficulties be provided against, essentially alike in all systems, though possibly the mode in which these steps are pre-arranged and the difficulties dealt with may vary with each system. For instance, a party claiming the assistance of a Court of Justice

may either be required to state his case to the Judge in person, and upon oath, as in English criminal practice, or he may summon his opponent to appear before the Court by issuing out a writ at his free will and pleasure as in English Common Law practice at home, or he may be required to obtain the sanction of the Judge for such a summons, and to file at the same time a carefully composed written pleading of his case as in the English Common Law practice in India, or he may serve citations on his opponent through an officer of the Court and file written allegations afterwards as is the practice of Courts following the Roman law, or he may commence his suit in two or three different ways by citations, or by caveat, or by an act on the part of the Judge himself, as is practised in the Courts of Doctors Commons.

And so at every stage of the suit, such as,—

1st. Application to the Court for its process.

2nd. Notice to the defendant.

3rd. Appearance in Court.

4th. Statement of the matters in dispute.

5th. Defence which is, either, in negation of the facts alleged, or of their coming within the legal category relied on by plaintiff, or both.

6th. Disposal of the preliminary law question (demurrer).

7th. Proofs of disputed facts.

8th. Arguments on the facts and law.

9th. Judgment.

10th. Execution of the decree of Court.

It is obvious that different Courts, administering different branches of the law, proceeding without concert with one another, proceeding often *in vinculis* from their limited jurisdiction (to say nothing of the felonious proceedings by which the early English Courts robbed each other of what was then valuable property),* I say, it could not but occur that different and discrepant rules of practice should be adopted, in order to dispose of the numerous and really serious difficulties which present themselves at every one of the above stages.

Now the terms of the question put by the Law Commission to the Judges of the Supreme Courts four years ago, having admitted of a full inquiry being made into the principles and *rationale* of procedure, I took the opportunity of the vacation months of April and May to go into the inquiry fully, and, as the final result, recommended that one uniform system for bringing before the Court the facts in dispute between suitors, for preventing delay on the part of the litigious, fraud on the part of the dishonest, error and caprice on the part of

* This may seem strong language, but I think no honest man who is unprejudiced can read the accounts of the struggles between the Courts to extend their jurisdictions, and thereby increase their fees, and especially the pages of Roger North, without assenting to its truth.

the Judge, should be adopted on all sides of the Court.* Whatever the wisest rules may be for effecting those important objects, let reasoning and experience be referred to, and let their dictates be implicitly obeyed. The object sought for is the same in all systems of Civil Law, *viz.* the dispensation of justice between man and man at the least possible inconvenience to the public or to the parties, and the best path to it, like every straight path, can only lie in one direction.

It is most important for the Government of India to remark, that on this main principle there is scarcely any difference of opinion amongst the Judges. For Sir Lawrence Peel, in his Minute of 13th February, 1844, embodying, as it would seem, the opinions of the other Judges, makes this important concession: "It would be difficult to shew that any peculiar mode of procedure is essential to the decision of any questions that may arise under any of the various heads of jurisdiction

* The general terms of this proposition would include criminal procedure, and so far as the attainments of justice between man and man in the simplest and most economical manner is concerned, the investigation and decision on crimes do not require different rules of practice from those which are adopted for other disputed facts. But, in Criminal Law, a higher object than the settling a dispute between two parties is in view, namely, the public exhibition of the punishments which society awards to crime, and hence a variation of practice for the sake of securing additional publicity and solemnity is called for by the nature of the case.

[redacted]essed by the Supreme Court, and *it would be obviously a great improvement to introduce in them a uniform mode of procedure which might easily be made to adapt itself to the particular system of Laws to which it was applied.*" It is true that the elaborate Minute of Sir J. P. Grant, written a year subsequently, puts forth views which would seem to clash with the above opinion of Sir Lawrence Peel. The learned Judge steps out there avowedly as a "*laudator temporis acti*," and he puts forward a vigorous plea in behalf of ancient institutions. Arguments, tinged with such a feeling, always recommend themselves with special favour to the larger portion of mankind, and always, even when pointed with infinitely less ability than distinguishes those now under consideration, deserve to be carefully regarded by the Legislator. A distinguished modern statesman and philosophic writer, the Prussian Minister Ancillon, observes:—"Il y a toujours dans la société, comme dans le parlement d'Angleterre, un parti d'opposition qui contrôle, combat, attaque tout ce qui se fait, se dit, se dècouvre, s'invente, tout ce qui est nouveau et différent du passé; ce parti de l'opposition est composé de l'ancien ministêre de la société, c'est-a-dire des vieillards, et de tous ceux qui ne donnent plus le ton dans la société; il est dirigé contre le nouveau ministêre, c'est-a-dire contre les jeunes gens, qui donnent aujourd'hui l'impulsion, mais qui avec le temps perdent leurs places, sont remplacés

par d'autres, et recrutent à leur tour l'opposition. L'existence de ce parti de l'opposition dans la societé y entretient la vie spirituelle et morale, amene le conflit et la liberte des opinions, previent beaucoup de bouleversemens, conserve l'ancien patrimoine en fait d'institutions et d'idées, et fait passer les nouvelles par un creuset épurateur."*

It would not be difficult to shew, I think, that the European administrators of India belong essentially to the "nouveau ministère." I verily believe there never has existed in any country an official class, amongst whom the desire to improve the institutions and welfare of the people has been so extensively diffused as in the servants of the East India Company. The application of English notions to the Government of an Asiatic country necessarily requires a bold examination of principles on very many occasions. A red tapist attachment to routine is consequently almost unknown in the service; and, on the contrary, it seems to be pretty universally admitted, that a slavish copying of institutions, which have been seen to work well in England, without any regard to the very different circumstances of this country, is the greatest error into which an administrator can fall.

The concluding observation of Ancillon, however, shews how valuable the conservative check is, and the necessarily frequent application of it to the race of young, vigorous and ardent administrators

* Melanges de Litterature et de Philosophie, vol. ii. p. 267.

in India serves, perhaps, to account for its predominating operation upon those with whom the final direction of affairs rests, and to explain the slow march of administrative improvements under the Government of India. A witty friend of mine, in this Presidency, observed to me once, that the Indian Government presents an antithesis to Carnot's definition of a despotism which acts without deliberating, whereas our Government is always deliberating but never acts! The remark, however, and the lessons of daily experince, denote the necessity of considering carefully the objections which counsel inaction.

Now the simple answer to Sir J. P. Grant's protest in behalf of ancient landmarks is one that I have already had occasion to give,* namely, that by introducing a uniform system of procedure, no change whatever is proposed to be made in the substantive law of the land. But not only no change is proposed in the latter, but even in the former no innovation, invention, or departure from established usages is to be found. Examination of parties to the suit, *vivâ voce* evidence, appearance of the parties in Court, and at an early stage of the cause, oral pleadings and moulding of the decree to suit the justice of the particular case, are all well known in the principles, most of them in the existing practice of the English Law. I venture to

* See letter to the Bombay Government in answer to Sir L. Peel's objections, dated May 22nd, 1844.

think that a fallacy is lurking in Sir J. P. Grant's mind, when he supposes the attachment of the English to *ancient forms* as well as to *ancient principles* to be so strong. Such attachment, no doubt, is often to be found amongst many nations in an early stage of civilization, and striking examples of the evils it has led to are to be found in the legal records of the Romans, the English, the Germans, and not less among the Hindus.* But as civilization advances, symbolic forms are rejected, substance is alone considered, and legislators, like Justinian and Napoleon, who abolish useless mum-

* An instructive instance of form prevailing over substance among the early Romans (I could cite many parallel ones from English Law) is recorded by Gaius. The XII. Tables gave a remedy for injuries to trees, *de arboribus excisis*, and one who had had his vines rooted up brought an action, but was cast because he used the word *vites* in his formula, and not *arbores*; and Gaius justly upbraids the pedantic technicality of the earlier times, by which the party, qui vel minimum errasset litem perderet, IV. § 11, § 30. This slavish adherence to forms, and adoptions of symbols amongst early nations (resorted to in the first instance from childish credulity, retained often by sinister interests), proves the operation of a principle deeply seated in human nature. Grimm's great work on the antiquities of the German Law, published in 1828, contains what has been well termed "un magnifique recueil de formules empruntées a tontes les jurisprudences," and his profound acquaintance with the languages and literature of Asia has enabled him to point out the wonderful similarity which exists between the nations of the East and West, not only in their languages, but in the symbols and usages adopted by each at an early period of civilization, to aid them in the difficult problem of all times—"judicial procedure."

meries, may well triumph, as did the former on having rooted out the last trace of the old farces of the law, *antiqui juris fabulas!* An Englishman of the present day no doubt feels justly proud that his house is his castle, and that if the rich man invades it unlawfully, the Courts of Justice will give him redress. I apprehend that he is wholly indifferent whether his action should be framed in trespass or in case, whether he is entitled to deny all the defences set up by his opponent in a replication de injuriâ, or whether he must traverse some single fact, whether judgment should be entered up for him on all the counts respectively or otherwise. He leaves all those matters to his legal advisers, and does not understand the meaning of them when he sees them mentioned in the Attorney's Bill. But I assert that he, with all sensible men not belonging to the profession, can feel nothing but disgust when the verdict goes against him at the trial, and involves him in enormous expences, because his legal advisers have not observed some form laid down in a year book five hundred years ago.*

* I extract the following Report of a case at the last assizes from the Daily News, March 23, 1847.

ASSIZE INTELLIGENCE.

Norfolk Circuit, Cambridge, March 22.

"*Nisi Prius*—Before the Lord Chief Baron and a special jury.

Chafy *v.* Lindsell. Slander. Sir F. Thesiger, Mr. O'Mally and Mr. Keane were counsel for the plaintiff. Sir F. Kelly, Mr. Serjeant Byles and Mr. Sanders represented the defendant. This

In point of fact, however, the Draft Act which I presume has been drawn up by the Judges of the

action was brought to recover damages (which were laid at £20,000) for slanderous words of a character unfit for description alleged to have been spoken of the plaintiff by the defendant who pleaded "not guilty." The evidence for the plaintiff shewed that the defendant had spoken the words complained of, with the meaning attributed to them by the declaration, but as well from the examination in chief as from the cross-examination it appeared that the words were uttered as the repetition of something stated to the defendant by some one else, and not as a statement on his own authority. Thereupon it was objected, that the plaintiff must be non suited. There was an obvious variance between the allegation and the proof, and, as an amendment in accordance with the proof would prejudice the defence, it could not be made. After lengthened discussion, the learned Judge retired to consult Mr. Justice Coleridge, and on his return into Court stated, that both himself and his learned brother thought that the variance was material, and that the declaration could not be amended. The plaintiff therefore was non-suited."

The fault here made was committed by the pleader, and, although the plaintiff clearly established his case, this fault gave the verdict against him, with all the costs of suit which, considering that Sir Frederick Thesiger was specially retained, would probably approach £1,000, and exceed it if the special retainer of Sir F. Kelly is also chargeable against the plaintiff. And touching the subject of costs, the following report of a case a few days later may not be uninstructive at a time when the question of the possibility of improvement in existing procedure is undergoing discussion.

"EQUITY COURTS.

Before the Lord Chancellor.

The Attorney General, v. The Corporation of Ludlow—Taxation of Costs.—This suit was instituted several years ago to

Supreme Court at Calcutta in pursuance of the views expressed by Sir Lawrence Peel in his Minute of February, 1844, contains very great, and as I said before, even radical changes in English procedure, and, if the Act be adopted, a very different system of practice will be in force at Calcutta to that which any existing Court in England displays. The large and wholesome powers of amendment

compel the Corporation of Ludlow to restore to the trustees of a school, founded by Edward VI. certain lands which became in the course of time, by accident or design, mixed up with the Corporation's own lands. The parties, in consideration of the difficulty of tracing and separating the charity lands from those of the Corporation, and to avoid the ruinous expenses of litigation, agreed in 1845, to a compromise, by which the Corporation bound themselves to pay £1,500 a year to the charity. To carry that compromise into effect required an Act of Parliament in addition to the sanction of the Attorney-General and of this Court which they had obtained in 1845. The Act was passed last session, and by an enactment in it the Corporation was made liable to pay all the costs of the suit. It was referred to one of the Taxing Masters of this Court to tax the costs, and a question arose as to who were the proper parties to attend the Master on the taxation. That question was now brought before this Court by the petition of the relators. Mr. Lloyd appeared for the relators, Mr. Bacon for the Corporation, Mr. J. Parker for the Master of the school, and Mr. Rolt for the Trustees. It would appear from Mr. Bacon's observations that the whole costs would amount to a sum between £16,000 and £20,000, and that to raise that sum the Corporation would have to sell a great part of the property."—*Daily News, March 29th*, 1847.

Between £16,000 and £20,000 costs for a suit which had been compromised to avoid the ruinous expenses of litigation ! !

which it contains for the purpose of rectifying the evils of special pleading will probably prevent any such harsh case occurring as that mentioned in the note at the late Norfolk Assizes, and the new forms and rules as to pleas which it introduces will possibly do much good; but they are all decided novelties. And lastly the provision which it introduces of the power of discovery at Common Law, by which in ordinary cases the whole of a plaintiff's demand will be enabled to be proved by the mouth of his adversary is the introduction of a principle unknown to the Common Law, and which, if we may reason from the analogy of a similar practice in Equity, will wholly alter the character of a trial at Nisi Prius.

I do not object to those great alterations; on the contrary, I think that they, or something in their place, are imperatively called for. The fact of their being propounded by the Calcutta Bench is all that I am concerned at present in noticing with reference to Sir J. P. Grant's solemn warning against innovation.

With respect to the alterations on their own intrinsic merits, what I desire most strenuously to enforce on Government is, my solemn conviction that Sir Lawrence Peel's Act (if I may venture to call it so) in no way disposes of all, or even of a greater portion of the evils which have been proved to exist; that it affords only a temporary relief for certain defects on the surface, and leaves untouched

the fertile sources from which most of the inconveniences in English procedure arise. I think further that I shall be able to shew, that some of the alterations which my learned friend proposes are at variance with the great principle he has himself laid down, and that his Act will in some respects even aggravate the evils of existing divergent practice.

I do not forget the plausible arguments which Sir L. Peel has put forth in his Minute of February, 1844, as to the advantage of proceeding step by step, "specially in a country like India, retaining as far as it can be done established systems"—and I know the weight which these arguments possess with the bulk of mankind, who have neither time nor inclination to grapple with legal questions. But with respect to a subject, such as is now under discussion, I humbly beg to protest against the application of the doctrine at all.

"In questions of Law Reform" (and I am now quoting perhaps the greatest living authority on Common Law) "when once the extent of the evil is "steadily discerned, the boldest reform is often the "most advisable, because it settles foundations and "prevents the great evil of frequent changes." The profession of the law is often flouted at by the vulgar, and one of the profoundest thinkers of the day* gives some stamp to the jeers by his observation, that the spiritual dominion exercised by law-

* Comte, Cours de Philosophie positive.

yers in the present day, in succession to that of the clergy of former times, is fast drawing to a close. I suppose, however, that the profession is neither better nor worse than others, and that, like the great bulk of mankind, they will be guided chiefly by their interests, real or supposed. No one can be surprised to find that a profession, whose time, as we have seen above, is fully occupied in learning what the law is, should be disinclined to speculative inquiries as to what the law ought to be, or that when certain defects have made themselves prominent to the public, they should be averse to a series of impotent and inefficient tinkerings on the part of those who set up as Law Reformers, and which leave the demand for Law Reform as loud as ever. Undoubtedly they have just cause to be angry when a series of infinitesimal alterative doses are applied to the legal corpus during such a length of time as to make it impossible for the most industrious practitioner to ascertain what the actual state of the law is. Since I have been in this country, a valuable, though very voluminous work, has been published on the practice of the Court of Chancery, but although these volumes contain actually more matter than the whole body of the Roman Law,* and

* A rough estimate of the contents of the Corpus Juris and of Daniell's Chancery Practice is curious:

	Corpus Juris.	*Daniell.*
No. of Words in a Page . .	210	374
Ditto Pages	3,294	2,160
Total Words	662,094	807,840

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were written with the view of "bringing under the "eye of the practitioner the several alterations and "modifications made by the numerous Statutes and "Rules of Court of late years"—so many more alterations were made in the law before the publication could be completed, that the author was compelled to abandon the task he had set out with, and to send his work unfinished into the world. It appears to me, therefore, that so soon as an evil in the existing law is pointed out of sufficient magnitude to call for the hand of the legislator, the interests of the profession coincide with those of the public in demanding a vigorous, well weighed, and *final* measure. A further objection to the proposed scheme of dealing with established evils in law procedure by gradual reforms is that it is nearly sure to prove illusory. I have shewn the objections necessarily entertained by the profession (as part of the natural history of lawyers) to changes generally in the law, and justly entertained when the changes proceed on no fixed principle, and through indefinite periods of time. The public, on the other hand, whose interests are paramount in the matter, pay so little attention to the subject that they are very apt to adopt all the notions, and imbibe the prejudices of those whose interests are certainly not coincident with their own. The consequence is, that an unsuccessful or an incomplete measure of Law Reform enables so many plausible arguments to be urged against alterations generally, that the progress

of improvement is arrested, and the happy opportunity lost of basing a solid reform on principle.

But I have shewn the remarkable unanimity which exists as to one broad principle, viz. the advantages of a uniform system of procedure (supra). How easy it would be for the Legislature to adopt this principle at once, and to call upon the legal authorities to work out the details! The readiness with which the Judges would lend themselves to such a task, is shewn by the new rules which the Lord Chief Baron and other Judges have lately framed for the summary procedure of the Small Cause Courts in England. And notwithstanding the disparaging observation of M. Comte, I am bold to say, that with the assistance of some of the gentlemen at the Bar of this Presidency we would produce in three months a set of rules, forms, and draft pleadings, with blanks to be filled up after oral discussion at the Bar, which should enable a uniform system to be applied to the whole civil business of the Court.*

The unanimity I speak of must, however, I suppose, be confined to Sir Lawrence Peel, and Sir

* I had intended to have subjoined a synopsis of different forms of procedure, as used in English Courts and elsewhere, but I am deterred by the fear of making this Minute too bulky, and content myself with subjoining a sketch of proceedings in the French Courts, as a specimen, not a model, of a uniform mode of procedure for all Civil Law disputes.

See Appendix C.

Henry Seton among the Calcutta Judges, for the subsequent Minute of Sir J. P. Grant shews that he, like Sir Henry Roper, considers the marked distinction between the administration of Law and Equity, as having contributed more 'to the singular perfection of English law,' 'its certainty,' and "the "celerity and cheapness of Common Law proceed- "ings," than the most philosophic system founded on all the experience of mankind could desire. And both Sir J. P. Grant and Sir H. Roper carry out their views logically enough by intimating that the true reform of English law in India would be by *locating* a Court of Chancery and a Chancellor by the side of the Supreme Courts at all the Presidencies! But, I repeat, Sir Lawrence Peel recognises, as fully as the Law Commission and myself, the advantages that would ensue upon the adoption of a uniform system of procedure for all sides of the Court. He accompanies the statement of this proposition with the qualification that such uniform procedure should not be introduced at once, but that successive steps should be taken towards the end which he admits to be so desirable. I have endeavoured to combat those latter views by referring to the evils, so well recognised by the profession, so equally apparent to the public when once their attention is called to the matter, of frequent changes in the law. It only remains for me now to examine the *mode* in which Sir Lawrence Peel has dealt with the main principle, and the *first steps*

which he has proposed in the direction we are both making for.

My objection here is that Sir Lawrence Peel has taken a false step by transferring a quantity of Equity matters to the Common Law, and that the true course should be to invest the Court of Equity with the power of dispensing the law generally. The Common Law is hampered with all the starched and stiff formulas, which, as I have shewn, belong to the jurisprudence of early nations. Equity is happily emancipated from all such distressing impediments to the attainment of justice, and as the growth of a later age, of a deeper philosophy, and of a more refined system of ethics, it is well entitled to perform the office, which it constantly exercises, of pronouncing the imperative rule of law in contradiction to the narrow dictates of the Courts of Record at Westminster Hall. There is a minor objection to be made, and it is worth making, because it appears to me to shew that my learned friend has not steadily kept in view the principle of introducing uniformity of procedure, with which he set out. He has in my opinion very wisely selected the best portions of the different systems for eliciting the truth which are now in operation in the Supreme Courts. With this view he has adopted the principle of *vivâ voce* examination on the Equity side, and he has also introduced into the Common Law that grand instrument for eliciting the truth which distinguishes Equity, and almost compensates for its

other defective procedure,* viz. discovery by the parties on oath. But in introducing this novelty into the Common Law, he has not adopted the analogy of Equity, but has in fact made the discovery to be given on the two sides of the Court completely different proceedings. By Sir L. Peel's scheme, a party at Law may be examined by his opponent *vivâ voce* at any stage of the suit, by his new scheme in Equity he may also be examined *vivâ voce*, but only at a later stage of the cause, after his answer has been reported insufficient, and after the time for filing exceptions has expired. How great the difference is between these two new modes of applying discovery, let lawyers decide.

* Lord Langdale's recent description of the powerful effect of discovery is worth copying in this place:

In Equity, "Every Defendant is bound to discover all the facts "within his knowledge, and to produce all documents in his "possession which are material to the case of the Plaintiff. "However disagreeable it may be to make the disclosure, how-"ever contrary to his personal interests, however fatal to the "claim upon which he may have insisted, he is required and "compelled under the most solemn sanction to set forth all he "knows, believes or thinks in relation to the matters in question "The Plaintiff being subject to the like obligation on the requi-"sition of the Defendant in a cross bill, the greatest security "which the nature of the case supposed to admit of, is afforded "for the discovery of all relevant truth, and by means of such "discovery this Court, notwithstanding its imperfect mode of "examining witnesses, has at all times proved to be of trans-"cendent utility in the administration of justice." Per Lord Langdale, M. R. Flight *v.* Robertson, 8 Beav. 34.

But greater and more substantial differences exist between Sir Lawrence Peel and myself than any I have yet adverted to. Supposing that we both agreed (as I conceive we do) that the Supreme Court sitting on its Equity side, with the improvements in examination adopted from the Common Law, and of discovery according to the new mode proposed by Sir L. Peel with Sir H. Seton's valuable work on decrees and Chitty's Forms available for the Judges—admitting that the Court with these aids could administer the whole corpus of the English Law, the question is still behind as to the mode in which the matters in dispute should be brought before the Court. With the opportunity of examining the parties *vivâ voce* at an early stage of the suit, and by adopting that lucid arrangement which only exists in the Ecclesiastical Courts, of having all the allegations of the parties broken up into distinct articles or paragraphs, it may be plausibly argued that the principal evils and redundancies now complained of in Equity pleadings would disappear. In a word the Gibraltar system which I adverted to in my first Minute, of bringing every thing forward on petition and answer would be in force.

Still even this improvement which would probably not be approved of by Sir L. Peel, (as he is one of the most strenuous supporters of the very different system of special pleading, and as he still keeps up the distinction between bill and petition),

and which certainly is not capable of being introduced under his Act, would fall far short of what in my solemn opinion are the fundamental principles of natural procedure. These are, 1st, the early appearance of the parties to the suit before the Judge; 2nd, oral pleadings. And in approaching this part of my subject and expressing myself in a tone bordering, perhaps upon dogmatism, I feel that I may without impertinence refer to the *viginti annorum lucubrationes* on all subjects connected with law and jurisprudence, which I have now nearly completed. It was my good fortune just before I entered the chambers of a special pleader to hear the great speech of Mr. Brougham on Law Reform in 1828, and very shortly afterwards to become acquainted with the works of Mr. Bentham. From that moment to the present, I think, I may fairly assert, that I have never lost an opportunity, whether in conducting the technical business of a pleader's office, practising at the Bar, reporting the decisions of the Court of Queen's Bench, visiting the Law Courts of Continental nations, or studying the works of theoretic and practical writers, of endeavouring to make myself acquainted with the rationale of rules of procedure and the comparative value of the methods adopted for the ends in view. The advantages which Indian experience confers in this respect, and especially the Presidency of Bombay where a Court of natural procedure had sprung up under the tutelage of such men as Sir William

Syer, Sir James McIntosh and Sir Edward West, are in my view so great, that now when I am approaching the end of my legal career, and when I have arrived at a time of life at which hasty and inconsiderate opinions are not fairly presumable, I do not hesitate, even at the risk of being thought dogmatic, to express my opinions in the strong and confident tone which I have adopted above. According to the theoretic views laid down by Mr. Bentham, the appearance of the parties before the Judge at the earliest stage of the suit is the simplest, the most rational, the most economic, and most satisfactory method of settling the matter in dispute. In nine cases out of ten, it enables the suit to be disposed of at once without any expense, in the tenth case it brings the parties on the stage who know better than any one else what the real matter in dispute is, and enables arrangements to be made for the further conduct of the suit. The method is eminently plastic, and allows of the complicated embrangled case of the rich suitor to be equally well and carefully disposed of as the simple difficulty of the poor for which a five minutes audience will often suffice. It is moreover founded on the principles of common sense; it is to be found occurring in the jurisprudence of all nations before chicanery has been allowed to raise its head, and seems so obviously to be the mode which reason would dictate for solving a difficulty as to make it a fundamental principle in natural procedure. I feel

bound to depose that all the experience which I have gained both from men and books confirms the truth of those doctrines. It is known that by the French Code a plaintiff cannot bring an action in the Courts of 'Premiere Instance' without having first summoned the defendant before a Juge de Paix to endeavour to compromise the matter. One of the latest writers on French procedure* whom I have consulted, describes the great advantage which this regulation works in the Provinces where the Juges de Paix are known, although it is less operative in Paris and large towns from the little influence or, as we should say in India, the low caste of the Judge before whom the attempt at conciliation is made. The Codes of Geneva and Brussels, which have been framed with French experience before their eyes have adopted the same institutions, though as it would appear with considerable improvements,† and Lord Brougham for many years past in the House of Lords has been pointing with triumph at the successful operation of the same principle in the Cours de Conciliation of Denmark.

The practice of the Roman Law Courts in the days of the great classical lawyers, and who certainly

* Rogron, Code de Procedure Civile expliqué, p. 26. Paris 1834.

† See Carré's Lois de la Procedure Civile, Tom. 1, 3me ed. par Chauveau Adolphe. Paris 1843.

did not live in "a state of society little removed from barbarism," enforced the appearance of the parties at the first stage before the Prætor, who in their presence and after hearing all their oral allegations, (for written Pre-arranged pleadings arose as a subsequent abuse) either pronounced judgment if the facts were admitted, or assigned a mode of trying disputed issues by referring them to a *Judex*, to the *Judicium centumvirale*, or to *recuperatores*.*

The practice of our own Courts shews us that every approximation to this principle is a great advantage. In the procedure of the Ecclesiastical Courts an arrangement prevails by which the parties are enabled to take the opinions of the Court at an early stage of the suit and before any great expense has been incurred. The evidence of the practitioners in those Courts before the Ecclesiastical Commission, all agree to the great convenience which ensues

* Gaius IV § 15. Deinde cum ad judicem venerant, antequam apud eum causam *perorarent*, solebant breviter ei et quasi per-indicem rem exponere. Lex XII. tab. Quum *perorant* ambo presentes.

See Holweg's admirable account of Roman procedure both under the Republic and in the times of the Classical Lawyers as under Justinian. Handbuch des Civil. Process Bonn 1834. The industry and knowledge of the learned German, and the valuable letters of Symmachus (the earliest of Law Reporters) enable us to demur to Sir J. P. Grant's doctrine that we know very imperfectly the practical mode in which the Roman Law was administered.

from this course, by which "cases are often heard and decided summarily without any evidence at all," and the Commission, consisting of some of the greatest lawyers of the day,* stamp the practice with their approval.† I witnessed a remarkable illustration of the efficacy of the practice in one of the visits which I have already mentioned to the District Courts at Ceylon. I have already described the defective state of the substantive law of that country. The Judges also for the most part have not been very happily selected. But the procedure which has been adopted upon fixed principles, and after careful consideration appeared to me most satisfactory, and to contrast very favourably with that which is to be seen in India. Every where I went I found the Court sitting at regular hours, and the same interest exhibited by the natives, and the same publicity shed over all parts of the proceedings as is exhibited at the most frequented Assize Town in England. The instance

* Lord Tenterden, Lord Wynford, Chief Justice Tindal, Sir Herbert Jenner Fust, Dr. Lushington.

† Hear also Lord Stowell. "It is the fate of this Court (Admiralty) frequently to have cases submitted to it loaded with difficulties which it is very laborious to remove; because the parties from whom alone explanation could be obtained, are living in another quarter of the globe. It sometimes happens, (it did so much to my satisfaction in the American case of the Providence), that the party is in the Court, and does, with a promptness that beats down all suspicion, give solutions as fast as objections are proposed." The Odin. 1 Rob. Adm. R. 263.

I am referring to was at a trial at Matura before a Native Judge. The action respected the right to half a field which was claimed by three different parties, and the points at issue were supposed to be raised by the written pleadings which the Home Government had insisted upon when they otherwise sanctioned the Code of Procedure, which had proposed pleadings by word of mouth. At this trial, however, the points were, as we so often find with special pleading, by no means clearly raised. But, the parties being all in Court, the Judge by a few skilful questions was soon able to elicit what the true points at issue were. A very well fought trial on nice points of law then ensued of four or five hours duration; the Judge laid down the Law and summed up the case to the Jury of three Cingalese, and a verdict was given which appeared to me as it did to the learned Judge to be perfectly satisfactory. In reference to that gentleman, I think it only due to him to state that in my opinion few Judges on the Bench in England could have conducted this cause more satisfactorily, and the school at Serampore which formed Mr. De Livera (a Cingalese of distinguished family, although of Portuguese name) may be justly proud of its pupil.

Lastly, the opinion of the British Legislature on the subject is very clearly expressed by the provisions which it makes to secure the presence of the parties before the Judge in all the Acts which

have been passed of late years for the simplifying of procedure in the causes of the poor. And as a further original testimony I have my own personal experience in the practice of the Small Cause Court during six years and upwards, and I unhesitatingly appeal to all those conversant with the practice of that Court, whether Barristers, Officers of the Court in which regular procedure prevails, or suitors, to confirm my opinion as to the manifold advantages derivable from the early appearance of the parties before the Judge.*

The next great principle in dispute is oral pleadings. And here I find myself at variance with the opinions, to a certain extent, even of the Law Commission, with whom on all other points I so cordially concur. The system of special pleading has been the object of such unbounded eulogy amongst Common Lawyers, it forms such an integral part of the administration of the Common Law, that a knowledge of it is justly esteemed essential to every one who claims the reputation of a good Common Lawyer, and therefore it is almost impossible for one educated like myself in the Common Law to take an unprejudiced view of the question. I have always been of opinion that the system is wholly

* This opinion has been strikingly confirmed by the strong and spontaneous petitions which the natives of Bombay have presented to the Legislature and Court of Directors in behalf of the Small Cause Court, when they thought it was about to be done away with.

inapplicable to India; and although from time to time, and very frequently in the course of my professional life in England, I could not fail to be struck with the numerous instances of injustice which its rules occasioned, I was still withheld, by the overpowering authority of great names who had pronounced on the subject, from examining the question for myself on its own merits; and, though disposed to doubt, I was by no means prepared to deny its claim to be considered 'a fine juridical invention.' But in preparing myself to write the present minute I determined to adopt the only sensible method of inquiry into a disputed question, viz. that laid down long ago by Descartes, of considering the question as *res integra;* and I accordingly commenced an examination *ab ovo* of that which its votaries call a science, and have very carefully gone through the treatises, the reports, and the acts of the Legislature relating to special pleading, not, as formerly, with a mere view to learn the rules, but to ascertain the value of them and their capability of being applied universally as a fine juridical invention should be for the discovery of the truth. It has been a long and tedious inquiry, but, having made it, I feel bold to say that special pleading is founded on principles opposed to the dictates of reason, and that even on its own principles it has proved a failure at every period of our legal history.*

* Vide Appendix B.

This is strong language to use, but I derive the proofs of it out of the mouths of the most revered authorities in the law, and out of the continued attempts of the Legislature, at all periods of our history, to remedy the evils which as I conceive are inherent in the system and irremediable.

I forbear from wearying the Government with the reasoning which leads me to form the above opinions, though, in order to demonstrate that they have not been adopted without care and deliberation, I am studious to set out the grounds of them in the Appendix. I am well aware, however, that on a question of this kind, that which must principally prevail with a Government is *opinions*, the *opinions* of persons most conversant with the subject matter, and I have always felt the great disadvantage which mine must labour under at Calcutta and with the Home Authorities, when compared with the opposite views of one so eminent, so able, and so well known, as my learned friend Sir Lawrence Peel. It is true that I have been enabled to elicit the favourable testimony of some of the most distinguished men on this side of India, whose personal experience has enabled them to form an opinion whether the schemes proposed are those of a visionary or of an industrious practical man, and whose conversance with native habits and existing systems of judicature justifies them in speaking authoritatively on the applicability of the system of procedure which I propose to Indian

Courts of Justice; and I may mention, without any breach of official etiquette, the names of the Honourable Mr. Anderson, Sir Henry Pottinger, the Honourable Mr. Reid, and the Honourable Mr. Willoughby. When Sir George Arthur was at the head of the Bombay Government, I induced him to consider carefully the whole discussion, and, pointing out to him what I declared to be a successful experiment (though to a partial extent) in operation at Bombay of the system which I was recommending, I requested him to inquire for himself amongst the principal Natives and Europeans who were conversant with the practice of the Small Cause Court, as to whether I was right or wrong in the favourable account I gave of it. His Honour was kind enough to make this inquiry, and was so satisfied with the result, that nothing but accidental circumstances (I believe) prevented the Bombay Government from endeavouring to set on foot the experiment at this place on the large scale originally recommended by the Law Commission. In my view a noble opportunity was then lost, and three valuable years have passed away unprofitably. At that period the Supreme Court was most favourably organized for the experiment. The Puisne Judge made an offer by which much additional drudgery would have been willingly undergone by him; and the then Chief Justice, Sir Henry Roper, being altogether hostile to the measure, a most vigilant tribunal of Review would have been in existence to correct

misdecisions or too hasty innovations. I confess that I am not altogether disposed to renew that offer at the present moment. Whether that three years additional residence in the tropics have produced their usual effect on a European constitution, or that I do not take "fortune's *buffets* and rewards with equal thanks," I conceive that it is not expedient for me now to undertake more than my own fair share of duty. At the same time I would not have inflicted upon the Government the trouble of reading this long Minute if I were not about to conclude it with a practical suggestion. Bombay is extremely favourably circumstanced for an experiment in law reform. For forty-eight years past it has presented the example of the best Small Cause Court in the British Empire. Sir David Pollock and myself have lately extended the jurisdiction of this Court to so large a sum, and over such a large field of law, that there is no reason, except the supposed conflicting interests of practitioners, why it should not be extended indefinitely. The community and the profession are therefore quite familiar with summary procedure, and the judges, as shewn by the late new Rules, are favourable to law reform. My proposition then is, that the experiment of the Law Commissioners' Court, as originally proposed by them, should be conducted at Bombay by the Judges of the Supreme Court. To carry out this experiment, however, but equally so to make the Supreme Court of either Bombay or Madras

efficient, whatever be the system of procedure, a third Judge is absolutely indispensable. And, as I have stated the grounds of this opinion fully in a letter to the Bombay Government where I have endeavoured to shew that the interests of justice require this addition to the Bench quite as much as the enactments of the Legislature whose provisions have been tacitly set aside, I beg leave to transmit copies of my correspondence with the Bombay Government on the subject.* I am inclined to hope that as I point out there a mode by which the demands of *justice* and of *law* can be satisfied without any additional expence, Government may be not ill satisfied to have the subject again brought to their notice.

I may now sum up shortly my opinions on the question proposed to us by the Honourable the President in Council. For the reasons which I have given I do not think it desirable to apply so much of the principles of Sir L. Peel's Act as involves organic changes in the Supreme Court to the Presidency of Bombay. This Draft contains many other provisions of a rather multifarious nature, many of which require a careful and separate consideration. Arrest on mesne process is one of the most important of the subsidiary alterations. I have thought a great deal upon this subject, and should not be able to convey my opinions here with reasonable brevity, and as the question is now undergoing grave dis-

* Omitted, being merely of local interest.

cussion in England, where the wants of a commercial community are making themselves heard in the Legislature, it appears to me that it would be premature at this moment to bring it forward for legislation in India. The same remark applies to many of the minor alterations proposed by Sir L. Peel: *primâ facie* they appear to me judicious, but I do not quite see the extent of them; and, as they are accompanied by no preamble, a cursory perusal does not readily catch the principle on which the legislator is proceeding. But, as to all these minor provisions, the remark may be made, that they are not called for by any pressing immediate evil, and therefore as a large measure of legislation *is* required on another portion of the same field, my general conclusion is that it would not be expedient to apply any part of Sir Lawrence Peel's Act, at present, to Bombay.

With respect to the Draft Act of the Law Commission, I have already stated my proposal that the original Draft framed by the Commission in 1843 should be enacted for Bombay, with some slight modifications which I will state immediately. The reasons why I make this proposal are — the original Draft is founded on a broader principle than the revised Draft, and, if the new Court presided over by a Supreme Court Judge is capable of dispensing justice in cases up to rupees 600 in amount, it is capable of doing so to all amounts. Lawyers well know that this mechanical division of causes on an

arbitrary limit of £. *s.* and *d.* is the most flimsy of all distinctions. And the ordinary objection of it being safer to proceed gradually, and to make the *experimentum in corpore vili*, does not apply here, because the well devised provision of the Law Commission by which the Supreme Court and the new Court would proceed *pari passu* is calculated to prevent injury to any individual. The public would witness the proceedings of the two Courts, and self-interest would select the best tribunal. If plaintiffs did not get justice in the Court they would not sue there; if defendants were the injured parties they would get redress in the superior tribunal. The modifications on the Commisioners' plan which I would desire to see introduced are, first to place the Court under the superintendence of a Judge of equal rank and emoluments with the Judges of the Supreme Courts. He ought, I think, to be a member of the Supreme Court Bench; and if, as I pointed out in a former Minute, all the Civil Law business of the Presidency was transacted before a single Judge in the first instance, and the appeal lay to the Bench of three Judges, exactly the same check upon misdecision as now exists in England would be introduced for the first time into India. The provisions of the Law Commission for obtaining Assistant Judges (even perhaps out of the laity) are I think sound in principle, but I also think it is most important, especially at the starting of a new system, that the head of the Court should be invested with

all the prestige which rank, salary, and *names* of honour confer. The second suggestion which I would beg to make is, to abolish all mention of special pleading. To leave a portion of it, above all, to leave the name, is to leave an opportunity to the *nimia subtilitas* of lawyers to reintroduce all the specialities of the system, colour, duplicity, departure, replication de injuria, the rule in Crogate's case, &c. &c., the prolific offspring, as Spenser sweetly sings, which is sure to emanate from error, just as from the black mud of Nile—

> " Wherein there breed
> " Ten thousand kinds of creatures, partly male
> " And partly female, of his fruitful seed:
> " *Such ugly monstrous shapes* elsewhere may no man reed."

Having thus answered to the best of my ability the questions of your Honour in Council as respects Bombay, may I be permitted to add that having ventured to treat the subject as one not limited to locality I presume to think the general conclusions I have drawn are equally, in some respects, perhaps, more applicable to Calcutta than to Bombay. At the former capital I understand that the demand for a system of cheap procedure is the most pressing want of the day. The provisions which happily exist at this Presidency for a tribunal of summary procedure have never been introduced at Calcutta, and the difficulty might be perhaps great now to establish them by judicial authority alone. In such case the two Acts in question presenting themselves

simultaneously for adoption, I think there can be no doubt whatever as to which best provides for the immediate evil.

I will now conclude this long discussion with the observations of a Judge, whose European reputation exceeds, and, with the exception of our own incomparable Hale, perhaps justly exceeds that of every other individual who has adorned the Bench. The President d'Aguesseau, during his exile at Fresnes, availed himself of the opportunity to draw up a Minute on Law Reform.* And in discussing the imperfect results which the celebrated Ordonnance of 1667 had produced, he attributed them to the very heavy charges which still pressed upon suitors. After advocating strongly their diminution, he adds these remarkable words: "Aprés tout le premier devoir de la royauté est de rendre ou de faire rendre justice a ses sujets. C'est une dette que le roi paie quand il les met en etat de la recevoir gratuitement, et il ne s'en acquitte qu' imparfaitement, lorsqu'il leur vend, en quelque maniere, ce qu'il est obligé de leur donner."

I have the honour to be, &c.

(Signed) E. PERRY.

SUPREME COURT,
Bombay, May 16th, 1847.

* Memoire sur les vues génerales pour la reformation de la justice. Œuvres, tom. 13 ed. de 1819.

APPENDIX B.

ON SPECIAL PLEADING.

I HAVE reserved for this place the statement, 1st, of my grounds for believing that the artificial rules belonging to special pleading are not supportable on sound reasoning; and 2d, of the proofs of my assertion that in practice it has always proved a failure. But to support the former branch of this proposition a volume instead of a note would be required: I must therefore confine myself to the statement of what I consider the most salient objections.

The main rules of special pleading have for their object the speedy production of an *issue*, for the subordinate ones as to *singleness* of issue and *certainty*, although classed by Serjeant Stephen as of equal rank with the former,* would seem, so far as a reasonable object is in view, to be based on the expediency of urging on the parties to trial as quickly as possible.

At all events the speedy production of an issue and the singleness of issue are so closely connected that it is difficult to reason upon this separately. Now it appears to me that the main object aimed at by these rules is altogether collateral or subsidiary to what the main object ought to be of rules of procedure. When parties are at difference respecting any legal claim or obligation and resort to the tribunals of their country for its settlement, the true object is that these differences, all the differences in dispute, should be settled. It is no doubt expedient to adopt any set of rules by which unnecessary delay shall be prevented, but, if these rules shut out the true question in dispute, they defeat the main object for which Courts of law are established.

The most ardent partizans of special pleading cannot deny that the rules which drive parties to an issue either on form or substance frequently tend to prevent the consi-

* Principles of Pleading, 168. 2d Ed. 1827.

deration of the case on its true merits. For "a decision on the issue whatever be its nature is in general decisive of the facts of the cause;"* and again "as the issue is the question which the parties themselves" (say rather their special pleaders groping in the dark) "have by their pleading mutually selected for decision, they are in general considered as having *mutually put the fate of the cause upon that question.*"† The palliation offered on behalf of this admitted tendency of the system to decide on mere forms, is, that Judges of modern times are liberal in allowing amendments. But conceive the word liberality being applied to a permission by the Judge for the defendant to bring forward his true defence.

It cannot, however, be too strongly insisted upon that the rule of the English Courts is, not to allow of amendments after solemn argument on demurrer, and the true rule is that which is cited from Serjeant Stephen above with the emphatic words in his own italics. What I therefore ventured to assert in 1843, and which has been the subject of much criticism, I now beg to repeat with the increased experience of four years attention to the subject, "the volumes of reported cases are full of decisions where the interests of suitors have been concluded *for ever* on some blunder or other of their legal advisers, and wholly irrespective of merits:" and, as authority on these subjects is that which principally guides opinion, the following extract from an article on Lord Abinger in the Law Review (where the fine Roman hand betokens its noble author Lord Brougham) will not be without its weight. "The effects of a slip or blunder or oversight at law are almost always irremediable, not seldom fatal." Law Rev. Vol. 1.

Again, the rule requiring singleness of issue constantly shuts out the whole case from being brought before the Court. It is so manifestly contrary to justice, that although submitted to in all its rigour for some hundreds of years the warmest admirer of the 'science' has never ventured to impugn or criticise the great innovation made upon it by the Statute of Anne. But, although a defendant may by the authority of that Statute plead several matters by way of defence, the principle of the rule is still in operation, and a plaintiff is not able to give the several answers in reply which the facts set up by the defendant would often

* Stephen on Pleading, 504. † Ib. 137.

admit of. And as judicial construction has allowed a defendant to plead a great many facts in one plea as amounting to one defence, and the plaintiff from the limited operation of the replication de injuria can frequently traverse only one of them, the effect of the rule, as I once heard it described by an old pleader in the Temple, is, that the defendant may tell as many lies as he pleases in his plea, the truth of all of which but one the plantiff is bound to admit, and possibly at the trial he may not be able to disprove the only lie in *issue*.

Every other system of procedure with which I am acquainted enables a defendant to raise two defences, and it would seem properly. First, he has a right to say, the case alleged by the plaintiff even on his own facts does not found any claim against me. But secondly, I deny the facts. Every other system allows both plaintiff and defendant to bring their whole case before the Court. I think I have a right to conclude that the system of special pleading which does not allow of either of these courses, which is so contrary to universal practice elsewhere, is also contrary to the principles of sound reasoning.

The doctrine of *certainty* with its definitions of certainty to common intent, certainty to a certain extent, and certainty in every particular, and its off-sets of variance, departure, negative pregnant, &c., appear but a developement under the system of special pleading of that over attachment to forms and love of subtleties which is said to be the peculiar vice of the legal mind. We have seen how it prevailed among the early Romans by the instance I cited from Gaius, the continental systems founded on the Civil Law are discreditably full of Chapters on "nullities," and in the minds of very many practitioners the maxim 'la forme emporte le fonds,'* is looked upon as one of unquestionable truth. I doubt, however, whether in any system this adherence to certain established forms has caused so much evil as the excessive technicality which is required in special pleading† and the frequent fruitless attempts which

* This is laid down solemnly by Rogron in his Code de Procedure Civile.

† In the very last number of Exchequer Reports that has reached this country, 14 M and W. part 5, there are the reports of seven cases following each other, in six of which the judgments proceeded not on the merits, but because the profes-

have been made by the Legislature during several centuries to correct the evil would seem to shew that it is altogether ineradicable.

I would add lastly, as a convincing proof to my mind that special pleading is not founded on broad principles of reasoning, that no one has ever suggested its applicability to any other judicial system. Of continental origin, it was soon abandoned in the countries which gave it birth, but even in England its claims to extension have never been put forward by any single jurist. That it should not have been adopted in the Courts of Doctors' Commons is readily intelligible, but, if it possesses the eminent advantage which Serjeant Stephen and the Common Lawyers claim for it, how can it be accounted for that it was never attempted to be applied to the great system of Equity which was built up by men educated in the Common Law, and eminently familiar with the specialties of pleading?

Supposing, however, that I have failed to prove that special pleading, as a system for bringing before the Court the disputed points in issue between litigant parties, is not founded upon principles that will bear the test of sound reasoning, and I certainly have neither time nor space to support my argument fully, it will be much more easy for me to prove the second branch of my position, viz., that special pleading, whatever be its theoretic merits, has always been a failure in practice. My proofs here consist of two classes of evidence. First, the opinions of Common Lawyers themselves, by which it will be seen that however warm their eulogies on pleading generally, the object of their praise is not the system as practised in their own day, but that of some remote period. And so, when we go back in our researches, we shall find the same reprobation expressed of existing practice, and all the laudation bestowed on the pleading of the good old times. The inference from this class of evidence is, to my mind irresistible, that if the able men whom I cite speak with

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sional advisers of the parties had not been able to frame their pleadings correctly, and it would appear that the parties had leave to amend only in three of them. The general reader will recollect the result of the judgment in Reg. *v.* O'Connell where all the legal talent that Government could enlist on their side could not succeed in drawing up a record that was able to pass through the ordeal of a searching legal investigation.

reprobation of that which they have personal cognizance of, and praise that which they only know of by tradition and imperfectly, their evidence founded on personal experience is drawn from them by the resistless power of truth, their evidence, as hearsay evidence, on matters some hundreds of years previous is not worth attention.

The second class of proofs consists in a chronological arrangement of the Acts of the Legislature, by which will be seen the attempts made for hundreds of years past to rectify the evils which special pleading had caused the community. The inference from these Acts I also look on as irresistible, namely, that the common sense of mankind had discovered from time to time that the fine juridical invention of the Serjeants and Countours was working them intolerable injury, 'Quoique qu' Hippocrate peut dire le cocher est mort.' 1st. Opinions of Lawyers on special pleading. Serjeant Stephen writing in 1827 points out very candidly the objections to the system; 1st, its tendency to decide the cause upon points of mere form; 2nd, the inconvenience of the rule requiring singleness of issue; 3rd, the abandonment of principle by the introduction of the general issue; 4th, and chiefly the excessive subtlety and needless precision of the system. But he thinks, on the whole, that the increasing cultivation of the science has made the course of practice more uniformly correct than in former times, and the inference from his work is, that no radical change was necessary. But this was not the opinion of the heads of the English Profession, for in 1833 the majority of the English Bench, as it is said, having decided to revert to what has been called the first principles of pleading, a Statute was passed by which a complete revolution was effected in the existing system. It may be too early perhaps to pronounce whether this great change is working well or ill, but it is sufficient to remark that some of the most distinguished English Judges have doubted the expediency of the New Rules, and the whole Irish Bench (as I understand from my friend Mr. Herrick of the Bombay Bar) have unanimously resisted the introduction of them into Ireland. However what I am now only concerned to point out, is, that the English Profession were dissatisfied with the system of special pleading as it existed in 1833. In 1794, a distinguished pleader, after giving the usual puff of the 'science when it is rightly understood,' admits that, at the time he was writing, "pleading seems to be involved

in all that perplexity can suggest, or prolixity supply." "Lamentable at *present* is the increase of costs upon the suitor and that even in cases where he succeeds." Note by Serjeant Runnington to Hales C. L. 301.

In 1757 Lord Mansfield thus expressed himself—"The substantial rules of pleading are founded in strong sense and in the soundest and closest logic and so appear, *whe* well understood and explained; though by being misunderstood and misapplied, *they are often made use of as instruments of chicane.*"*

About 1700 Lord Holt and his brother Judges introduced as an indulgence the plea of the general issue, which is acknowledged to be a complete departure from the principles of pleading, and their reason for it is stated to be their "opinion that the rules of the science were somewhat more strict and subtle than is consistent with the ends of justice."†

Sir Mathew Hale describing the pleadings of his own times (1630-70) states that as to their length and nicety they "far exceed not only that short yet perspicuous course of pleading which was in the time of Henry VI., Edward IV., and Henry VII., but those of all times whatsoever as our vast presses of parchment for any one plea do abundantly witness,"‡ and the reasons he gives for this degeneracy of pleading are so pertinent to the present discussion, so conclusive, as far as the authority of his great name is concerned, on the comparative expediency of written and oral pleadings that I transcribe the passage at length.

"First, because in ancient times the pleadings were drawn *at the Bar* and the exceptions also taken at the Bar, which were rarely taken for the pleasure, or curiosity, of the pleader, but only, when it was apparent, that the omission, or the matter excepted to, was for the most part *the very merit and life of the cause*, and purposely omitted, or mispleaded, because his matter, or cause, would bear no better. But now, the pleadings being *first drawn in writing*, are drawn to an *excessive length, and with very much laboriousness and care enlarged*, lest it might afford an exception not intended by the pleader, and which could be easily supplied from the truth of the case, lest the other party should catch that advantage, which commonly the

* Burr. 319.

† Stephen, 199.

‡ Hale C. L. 302, 5th Ed.

adverse party studies; not in contemplation of the merits, or justice, of the cause, but to find a slip to fasten upon; though in truth, either not material to the merits of the plea, or at least not to the merits of the cause, if the plea were in all things conformable to it."

"Secondly, because those parts of pleading which in ancient times might perhaps be material, but at this time are become only mere styles and forms, are still continued with much religion; and so all those ancient forms at first introduced for convenience, but *now not necessary* or it may be, antiquated as to their use are yet continued as things wonderfully material, though they only swell the bulk, and contribute nothing to the weight of the plea."

Lastly, Lord Coke in the work which contains the accumulated knowledge of his long laborious life, after giving the highest eulogies as usual, to the *science* of pleading generally, and, referring its golden days to a period three hundred years previous, viz., "the Reigns of Edward the Second, Edward the First, and upwards," makes this important admission, "when I diligently consider the course of our books of years and terms from the beginning of the reign of Edward 3rd, I observe that more jangling and questions grow upon the matter of pleading, and exceptions to form than upon the matter itself, and infinite causes lost, or delayed for want of good pleading."* Here then for 300 years past is a list of witnesses, a *Catena patrum* of the most distinguished names in our Law admitting in the middle of their eulogiums of pleading that in their own time it was not *working well.* I now turn to the efforts made by the Legislature to afford relief, and in which the voice of the public may be faintly perceived as well as that of the profession.

2nd. Reforms in pleading by Parliament.

The Legislature commenced a series of Statutes so early as 1341 for preventing failures of justice by the errors which constantly occurred in setting out the pleadings on record, and which, the Judges used to hold, vitiated the whole proceedings. The 14th Edw. 3. st. 1 c. b., 9th Hen. 5. st. 1 c. 4., 4th Hen. 6. c. 3., 8th Hen. 6. c. 12., and 8th Hen. 6. c. 15, are all Statutes in this sense, and one would have thought had given the Judges full power to correct any clerical error, and to prevent any miserable technicality

* 1 Inst. 303 a.

impeding a decision on the merits of the case. This was not so however, for at the time when (and this fact deserves to be most particularly noted) the practice of oral pleading at the Bar first began to be abandoned, and written pleadings were prepared out of Court,* the evils inherent in such an artificial system became so apparent as to call for the remarkable Statute 32nd Hen. 8. c. 30. The preamble is worth a careful study, but the following is a brief epitome.

For as much as before this time the parties in all actions have been greatly delayed and hindered in their suits "by reason of the crafty subtle and negligent pleadings" of the parties by which after verdict on the issues joined, and the Justices ready to give judgment for the parties for whom the same issue was found, the parties have been compelled by the course of the Common Law to replead, &c., "which is thought as well a great slander to the said Common Law and to the Ministers of the same, as also a great delay and hindrance to the parties that they should not have their judgment when the issue had been found for them," and the Act then goes on to enact that after an issue tried judgment shall be given for the party in whose favour it is found, any mispleading on the part of the parties, their *counsellors or attornies* notwithstanding." An excellent Statute, this, and, if it had been fully carried out by the Judges, it would have prevented the necessity for the subsequent efforts of the Legislature to direct the decision of the Courts to merits and not to forms.

The next Statutes were the 18 Eliz. c. 14. and 23 Eliz. c. 3, which by applying a remedy to very minute specific errors, probably tended to aggravate the evils of excessive technicality, by leaving other errors not named to have their full or additional weight.

This would appear by the preamble of the next Statute 27 Eliz. c. 5, which is conceived in a more general spirit. It recites "for as much as excessive charges and expenses, and great delay and hindrance of justice hath grown in actions and suits by reason that *upon some small mistaking or want of form in pleading* judgments are often reversed by writs of error, and oftentimes upon demurrers in Law given *otherwise than the matter in Law and very right, of the cause doth require,* whereby the parties are constrained

* See Lord Holt's description of the oral pleadings as they formerly prevailed at the Bar. 3 Salk. 128.

either utterly* to lose their right, or else after long time and great trouble and expenses to renew again their suit. And it enacts that, after demurrer joined, the Judges shall give judgment according as the *very right* of the cause shall appear without regarding any imperfection in form except such as the defendant shall specially point out with his demurrer.

The 21 Jac. 1 c. 13, recites the 32 Hen. 8 c. 30, concerning mispleading, and 18 Eliz. c. 14, for the reformation of Jeofails, and calls them "good and profitable laws, by which many delays of judgment were prevented, and yet notwithstanding many things have and daily do fall out not yet provided for nor remedied by the laws before mentioned," and the Act then proceeds to cure many defects by which judgment was often stayed or reversed after verdict passing for the party on the merits.

We now come to the time of Lord Hale, and we have heard his opinion as to the state of pleadings in his day; here is the mode in which the Legislature attempted to apply a remedy. The preamble of 16 and 17 Car. 2 c. 8, states—"Whereas great delay, trouble and vexation hath been and still is occasioned to the people of this realm as well by arresting and reversing of judgment, as by staying executions by writs of error and supersedeas," and it then proceeds to enact that certain specified defects "in form or lack of form" shall not vitiate after verdict.

In the 4 and 5 Anne c. 16, the Legislature made another attempt to induce the Courts "to give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission or defect, &c.;" but this Act also has been as unsuccessful as its predecessors in carrying out the clearly expressed intention of the Legislature. During the remainder of the 18th century the only other reform attempted by Parliament on the system of special pleading was the introduction of the plea of the general issue whenever they had occasion to mention law procedure, and this course also as we have seen was permitted by the Courts as "an indulgence"† to remedy evils which were too apparent to be denied.

* Concluded *for ever*, on some blunder of their legal advisers.

† See 1 Lord Raym. 566.

Lastly, the 3 and 4 Will. 4 c. 42, introduces the total alteration in the practice of pleading which I have before spoken of, and which as a contemporaneous experiment may possibly not yet be sufficiently tested. But I feel sure that I express the opinion of the majority in the profession at Bombay, as well as my own, when I deplore the introduction of the New Rules into India, and wish that the Judges of 1839 had imitated the example of their brethren on the Irish Bench.

It results most clearly from this search through the Law Books to ascertain when it was that the science of pleading really did flourish, that the reigns of Edward 1st to Edward 3rd are selected by the majority of panegyrists. Now I have already pointed out that during this golden period, the practice of pleading was exactly that which the Law Comisssioners and myself recommend, namely, allegations by word of mouth by the parties and their legal advisers in open Court, and recordation of such pleas by an Officer of the Court.* If certain artificial rules, such as those for duplicity, confession, or traverse, singleness of issue, &c., are observed in this pleading, the system is special, if only the rules of logic are attended to, such as good reasoners use in all ratiocination then the system is natural—but in both cases the grand advantage of pleading orally appears to me so obvious, so conformable to reason, so calculated to bring out the true question at issue and without any delay, that the more I study the subject the more I become convinced that the foundation of all rational procedure is the appearance of the parties to the suit in Court at the earliest possible stage, and oral pleadings by themselves or their Counsel.

I will conclude this note with a specimen from the year books of the mode in which our old Lawyers used to conduct their pleadings,† and the special pleader of the present

* It would appear that in the earliest times in which our legal records extend, the pleadings were written whilst the Court was sitting, but that subsequently the roll was carefully engrossed by the Clerk at his leisure from the notes taken in Court of the oral pleadings. See Sir F. Palgrave's introduction to the Rotuli Curiæ Regis, p. vi.

† Sir L. Peel seems to think that we know but little of the oral pleading of the early lawyer, and he says, "the practice of it is to be learned only from the year books." But seeing

day will be able to decide, in what space of time, or whether even at all, he could bring forward the various questions which the parties have very properly raised and disposed of, say in half an hour.

Writ of forger for false deeds.

"Markham Serjeant, for the defendant (taking by protestation that he did not forge) for plea said that the defendant gave the plaintiff a gallon of wine in satisfaction of the action, which gallon of wine the plaintiff accepted; and he demanded judgment accordingly. And then Fortescue Serjeant of Counsel with the plaintiff: it is no plea unless you say that there was an accord betwixt the plaintiff and defendant. Markham answered I shall say no more. Newton, the Chief Justice, who gave the rule in the case; it is the best pleading as Markham has pleaded, in my opionion, and substantial enough; for, if he has given the plaintiff a gallon of wine for the same trespass, which the plaintiff has received, what would you then?

And afterward Fortescue denied the receipt of the gallon of wine in satisfaction of that trespass." See 1 C. B. 785.

(Signed) E. PERRY.

26*th May*, 1847.

that the Y. B. are contained in 10 or 11 goodly closely printed folios, as well might it be said that we know nothing of the Roman Law except from the Corpus Juris, or of the early history of the Jews, except from the five books of Moses. One who knew the year books much better than Sir L. Peel or myself, has given a very instructive account of the mode of oral pleading, and he has given a very different account for the decline of pleading to that attributed to him by Sir L. Peel, for, as the passage, I have cited above, shews, he ascribes the change from oral pleadings to pleadings written out of Court as the great cause of the defective system existing in his own day, and he brings forward quite in the last place the reason selected by Sir L. Peel. See 1 Hale's C. L. 303-5.

APPENDIX C.

SKETCH OF FRENCH PROCEDURE.*

Small causes in France up to 100 francs are instituted before the Juge de Paix. The proceedings are summary; written pleadings are prohibited, although the parties may deliver to the Judge written statements of their case; the parties are examinable; and an appeal lies on demand exceeding 50 francs to the Court of Premiere Instance.

Commercial causes are tried before special tribunals called Tribunaux de Commerce, proceedings are summary, parties are obliged to appear in person or by some one constituted specially for the purpose, and the agency of attornies is not required, as it is in all French Courts, except those of Commerce and the Juge de Paix.

All other causes are brought before the Tribunaux de Premiere Instance, who decide without appeal on matters to the value of 1,000 francs, and above that sum, appeal lies to the Cour Royale.

As these Courts exercise the functions of our Courts in Westminster Hall both of Law and Equity, and also of the Courts at Doctors' Commons, it becomes interesting to examine the system of uniform Procedure which they have adopted.

Procedure in the Court of Premiere Instance.

1. Before an action is brought, the complainant must have summoned the defendant *en conciliation* before the Juge de Paix, and it is only on certificate of the attempt at conciliation having failed that a right of action accrues.

Rogron, p. 26, observes that this preliminary meeting operates exceedingly well in the Provinces, but not so well in Paris and the large towns, where the Juge de Paix is but little known, and carries no weight with him. In the more recent Codes of Geneva, and the Pays Bays, a voluntary appearance *en conciliation* has been substituted, and seemingly with the approbation of French jurists. See 1. Chauveau Adolphe (p. 208.)

* The authorities for the above sketch are Le Code de Procêdure civile, commentary upon it by Rogron—Bruxelles, 1838, Lois de la procédure civile par. Carré 3 ed. par Chauveau Adolphe, 6 vol. Paris, 1843.

2. A complainant must then constitute an Attorney (avoué) who instructs an Officer of the Court (huissier) to draw up a summons, called l'ajournement, which it is the duty of this Officer to serve and indorse, and the ultimate onus of any defect in form is generally thrown on this Officer.

3. L'adjournement contains the following points:

1st. Date, name, &c., of plaintiff and of his attorney, with intimation where notices are to be left.

2d. Names of the huissier and of defendant.

3d. Object of demand and statement of proofs.

4th. Mention of the Court where, and the day when defendant is to appear.

4. Within the time mentioned in the summons (usually eight days) the defendant must appoint an Attorney and signify it in writing to the opposite Attorney, in default of which the plaintiff may obtain judgment by default.

5. Within 15 days of the last step the defendant must put in his answer, stating his evidence, and making a tender to exhibit* it to the opposite Attorney.

6. Within 8 days the plaintiff may put in his replication (not dissimilar to an amended bill) in which he—

1st. States his case.

2d. Examines the evidence of the defendant.

3d. Adduces the law in his favour.

4th. Prays relief according to the prayer of his summons.

And these are all the pleadings which are allowed in taxation. The plaintiff, however, is not driven to reply, but may set down his cause for trial at once on the defendant's plea.

7th. At the expiration of the above 8 days, either party may give notice of trial to the opposite Attorney.

8th. One day at least before the trial, the Attorney who sets down the cause for trial must file a *placet*, containing—'des qualitiés des parties, des motifs, et des conclusions.'

9th. On the day fixed for the trial the opposite Attorney must deliver in a Statement of his case (*conclusions*) which

* French Legislators consider proof by witnesses as so untrustworthy, that it is almost wholly prohibited. See Cod. Civ. art. 1341, the consequence is that the "evidence" referred to means exclusively written testimony.

is joined to the *placet*, and it would seem that notice of this must be given to the other side three days before the trial. See Rogron, p. 46.

10th. At the trial the parties may plead for themselves assisted by their Attornies, and the Court after hearing the case may pronounce final judgment. But if the pleadings and evidence leave the Court in doubt as to the facts, they may pronounce interlocutory judgment either for un deliberé, or l'instruction par ecrit.

11th. A deliberé is of two kinds, by the first the Court merely adjourn the case for discussion amongst themselves (equivalent to our C. A. V.) or they refer it to a single Judge to report upon for the consideration of the full Court.

12. *Instruction par ecrit.* If the cause does not appear ripe for decision on the pleadings or deliberé, the Court orders that additional pleadings be furnished—in order to be laid before one of the Judges for his report.

[*A proceeding, says Rogron, p. 53, which entails 'formalités, frais, et longueurs.'*]

13. Within fifteen days after notice of the above interlocutory judgment the plaintiff must serve the defendant with his case (Reqûete) which must contain a statement of the proofs he relies on. and within 24 hours he must file his written evidence with the Registrar, technically called *production.*

14. Within fifteen days of the above production of proofs the defendant must put in his answer, and *produce* his own proofs.

15. Either party may after this *produce* new evidence (*nouvelles pieces,*) which he must deposit with the Registrar and may draw new *conclusions* from them.

16. The other side has then eight days to inspect the fresh evidence, that is, he may have the documents themselves placed in the hands of his Attorney; and at the end of that time he must answer.

17. If any facts are in dispute, to the proof of which witnesses are admissible the party on an allegation setting them out may obtain a decree for an inquiry, or the Court may order it ex-officio.

18. The parties at every stage of the cause may also obtain an order of the Court on a similar allegation for the examination of the opposite side.

19. The Court may also order the appearance of the

parties either ex-officio, or on the application of either side.

The following is a summary of the time required to bringing a cause to a hearing:

	DAYS.
1st step—Summons and appearance to effect a compromise before the Juge de Paix (say)	4
2nd.—Application to Attorney and instructing him with state of case (say)	4
3rd.—Instructing by Attorney to Huissier to draw summons and service thereof (say) . .	3
4th.—Summons to appear in eight days . . .	8
5th.—Defendant's answer	15
6th.—Plaintiff's reply	8
7th.—Preparing *placet* and getting ready for trial (say on average)	30
Total	72

But this period only applies to cases where the points in issue are fully raised by the pleadings, where no examination of witnesses is necessary, or any other '*incident*' arises, and as by the above course the defendant has had no opportunity to answer the case made by the plaintiff in his amended bill, except by the *conclusions* which he brings into Court with him on the day of trial, it would seem probable that in all complicated cases, the Court must be driven to order the *instruction par ecrit*, in which case the opportunity afforded to litigious and dishonest suitors to protract the pleadings seems all that chicanery could desire.

General Remarks.—This system of procedure contains elements of some of the best methods of practice; discovery from the parties; their appearance in Court; communication of the evidence before trial; opportunity to bring the parties' whole case upon the record. The objections seem to consist in the length of a disputed cause which is evidently produced by written pleadings, in the reluctance to admit any evidence except written, and in many of the principles, which I venture to characterize as valuable, not being brought sufficiently prominently forward. Thus, it is said that it is an exceptional and expensive proceeding to obtain discovery from the parties, see Rogron, p. 122, and the mode pursued seems ineffectual to

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